Supreme Court, U.S.
FILED

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No. 10-

IN THE
Supreme Court of the United States

JUDY KNIGHT

Petitioner,

V.

MOORING CAPITAL FUND, LLC; and
MOORING FINANCIAL CORPORATION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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encourage ineffective reviews? What recourse is available when they are improperly applied? Does deferential review permit, or even encourage, lower court "anything goes" to clear the docket? Why is review of law non-deferential, when justices are presumed to know the law? And deferential review is applied to fact issues that are more prone to errors in interpretation? In other words, are they applied exactly opposite of what would produce more equitable decisions?

Petitioner seeks a writ of certiorari so that the Court can determine the proper application of the standards of review, and resolve the conflict of this decision with its own and other United States courts regarding the admissibility of evidence, of witness testimony, inclusion of complaints under the simple pleading code and the ambiguity of the trial court's conclusions between Petitioner and co-claimant.

The Tenth Circuit Court, without reservation, affirmed in all respects the rulings of the district court. Although Petitioner's Appeal attempted to present certain issues under the clear error doctrine and de novo standard, the Tenth Circuit purportedly affirmed those findings under the deferential abuse of discretion very narrowly applied. In addition the Appeals court ignored several issues, either intentionally or unintentionally. In so doing, the Tenth circuit also ignored rules of the civil court, contravened and departed from decisions of possibly every court in this great land

Bose Corp. v. Consumers Union of United States,

Inc., 466 U.S. 485, at 501, 104 S.Ct. 1949, at 1959, 80 L.Ed.2d 502 (1984). When *de novo* review is compelled, no form of appellate deference is acceptable.

The legal maneuvering of the respondents and wholesale adoption by the lower courts of their conclusory statements, while expedient to clear the docket, has obscured the facts of the case requiring detailed re-iteration to disclose the errors in rulings.

That is the rabbit hole that officers of the court like so many Alices plunged through directly into wonderland. Behold the queen of hearts, Respondents, that has spewed its rhetoric into the system Petitioner puts the courts' deference on trial, welcome to the madhatters tea party.

BACKGROUND

These cases are about money, the need for it, the lack of it and

Respondents acts and omissions that denied Petitioner's right of access to it and the consequences that followed

Truly a case of the time-tested proverb "For want of a nail the ...kingdom was lost," illustrating how one seemingly simple event can lead to catastrophic consequences:

Respondents (collectively 'Mooring') are: Mooring Capital Fund, LLC, ('Capital') an unregulated company engaged in purchasing loans/mortgage backed securities, primarily sub-prime, which it packages into portfolios for sale to the public Mooring

Financial Corp. ('Financial'), also unregulated, is the managing/servicing agent for Capital and numerous other corporations formed by the same founder to purchase tax liens across the United States Financial employs about 40 people including accountants, CPAs and attorneys who perform all functions of the other companies

The causes of action in this case stem from Respondents' acts and omissions with regard to their attempts to collect amounts ranging from127%[4]-171%[5] of the amount legally owed on a Note and Mortgage holding a shopping center as collateral. (collectively "the Note") The Note originated in 1992 with an Oklahoma based national bank, and was executed by Petitioner and co-claimant, Petitioner's wholly owned corporation, Phoenix Central, Inc. ("Phoenix"). Bank One purchased the local bank becoming a holder in due course. Capital became a holder by purchasing the note in July 2002. Respondents' bad acts and omissions[6] caused the separate damages claimed by each Appellant and are as relevant to one's claims as they are to the others.

The order of this petition was dictated by Petitioner's belief this Court must first develop a

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[4] See p.10

[5] Demand at 4/8/05 was $363,592.28. versus a post-discovery calculation of $212,906.60.

[6] Refusing to investigate or correct the balance or provide information for 3-5 years.

clear understanding of the damage claims before turning to the facts and issues of law presented here. This is because the lower courts' faulty interpretations improper re-characterization, or misunderstanding of the damages formed the core of the denial of petitioner's entire case.

Petitioner applied for refinancing from other lenders and was approved several times in 2003 and 2004, conditioned on a first mortgage on the shopping center.

Due to Respondents' overstated demands, Petitioner was unable to obtain those funds necessary to reach certain objectives including:

Payoff of higher interest loans and reduction of monthly payments,

Completion of "fixing up" repairs to several vacant former family residences to prepare for sale,

Development of owned 40 acre tract and sale of resultant one-acre residential lots, and

Infusion of capital into going businesses.

Achievement of those objectives would have eliminated ongoing costs associated with property ownership, reduced other expenses and produced revenues from sale proceeds and established business[7]-all of which would have increased the cash

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[7] Projected losses from this business were not included in damages.

available to her.

So I ask, does that plan make sense to you? The Tenth circuit said it does not.

Method of computing damage schedules and summary:

Simply put, Petitioner's damages presented were limited to the

A. Re-investment earnings - Earnings rate times cash generated from:

1. The cash that would have been available (computed by adding):

a. Cash that would have been received from the sale of certain property at certain times, net of "fixing up" costs not paid out of new financing to

b. Costs that would not have occurred but for Respondents' torts. (See B below).

PLUS

B. Re-imbursement of costs that would not have occurred "Excess Expenses" (computed by adding):

1. Actual out of pocket costs paid that would have disappeared with the sales of the property, e.g. taxes, insurance, etc.

2. Actual Interest costs paid and accrued in excess of amounts that would have occurred with new re-financing due to variance in rates and timing of payoff.

3. Attorney fees required to achieve desired results (in mitigation forcing correct calculation or wasted due to vexatious litigation.)

Does that make sense? Is that straight forward? Appellate says it is not.

"And her plans and projections went beyond straightforward common-sense calculations." *Apx22a*

COURT PROCEEDINGS

The Phoenix case was ongoing for nearly 3 years before Petitioner was allowed to join. It's necessary to include certain data re Phoenix' case here as many of the arguments are the same only the damages differ.This should not be construed as arguing Phoenix' case, as the other courts deemed, but merely providing relevant history. The inclusion of this information should become apparent as the story unfolds.

It is also apparent some of the rulings and pre-conceived notions made in the Phoenix case poured over to Knight in error.

"After Phoenix and Ms. Knight stopped making payments on the Note in February 2005, Capital initiated a state-court action against Phoenix [seeking $363,592 as of April 8] to recover on the Note and to foreclose on the Shopping Center. Citing diversity jurisdiction, Phoenix removed the action to federal court. Phoenix also brought several counterclaims seeking damages for not being able to accomplish the

refinancing and therefore not being able to [complete the stated objectives In it's third amended answer and counterclaim Phoenix alleged that Capital breached [the Contract and] the Note's implied covenant of good faith and fair dealing and was liable for negligence, tortious interference with prospective business relations, and tortious breach of contract." (Apx3a)

Phoenix also requested a declaratory judgment to determine the true note balance.

Attempting to arrive at an accurate balance, counsels for Phoenix and Capital exchanged loan histories in January, 2006, but did not reach agreement Notably, Respondents' schedules did not agree with any previous balances demanded or include balance on date purchased.

[After being denied the right to intervene as being too close to trial date,] *"Ms. Knight and another of her companies, Mini Malls of America, filed a separate state-court action against Capital and Financial"* [in May, 2007, served in November.].Apx4a

[On Aug 7, 2007, in the Phoenix case]," *The district court granted partial summary judgment in favor of Capital with respect to liability (but not damages) on its claims."* Apx3a

The court rejected Ms. Knight's "course of dealing" method of applying payments shown on the

exchanged loan schedule, accepted Moorings[8]' post-litigation calculation with one exception, but made no mention of this ruling as a declaratory judgment.

"*[] It also granted Capital summary judgment on all of Phoenix's counterclaims, except the counterclaim for breach of the implied covenant of good faith and fair dealing"* [deeming Capital's actions as a mere "mistake"]. Apx3a

Aug 17th, 4 days before trial date, Capital finally produced requested but previously concealed information from Bank One. Those documents invalidated Capital's previous arguments. That submission proved Mooring knew the note balance when they purchased it was $316,040.12 instead of the $401,001.08 they booked, hardly explainable as a typo or transposition. This most material admission caused a cancellation of Phoenix' trial. In March 2008 the court vacated its 2007 orders, stating:

> "On the eve of trial, Mooring apparently located and turned over additional discovery which, viewed in the light most favorable to Phoenix, suggests Mooring knew or should have known of the actual loan payoff and interest rate at the various times it was quoting or seeking a different payoff from Phoenix" Aplt's Apx 435 or Aplt's Sup 236.

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[8] In November, 2006, Respondents accepted Petitioner's balance calculation as of February 28, 2001 as reasonably correct and used it to recalculate balances provided in August, 2007 and October, 2008.

> "By contrast, the additional documents produced by Mooring and now relied on by [P]hoenix as to what Mooring knew or should have known as to the proper amount due, the applicable interest rates and the like are sufficient, viewing them in the light most favorable to Phoenix, to create a justicable issue as to whether Mooring's conduct was knowingly, intentionally or recklessly wrongful so as to afford a potential basis for recovery on some or all of Phoenix's counterclaims. As a result, the court concludes its summary judgment order should be vacated as to Phoenix's counterclaims" Apx116-117a.

Mooring removed Petitioner's action to federal court, and the cases were consolidated in 2008.

Laboring under a misconception that Petitioner was not a maker on the Note, "*the district court dismissed the state-complaint claims because Ms. Knight and Mini Malls had not "state[d] a basis for recovery separate and apart from whatever harm Phoenix may have suffered," but allowed them leave to amend".* Apx4a

Petitioner's counsel interpreted that order as meaning the causes could not be identical to Phoenix'. Therefore the amended complaint alleged negligent omission and misrepresentation and emotional distress.

[Now acknowledging Petitioner as a party to the Note] "*the court held that Mini Malls had shown only*

an attenuated relationship with Capital that was insufficient to create any legal duty owed by Capital. The court also held that Ms Knight,... may have claims against Capital that paralleled Phoenix's counterclaims, but the allegations did not adequately plead tort liability under applicable Oklahoma law The court allowed Ms. Knight leave to amend...to set forth claims paralleling Phoenix's claims".

[In July, 2008] "Ms Knight's second amended complaint set forth [the original complaint's] claims of breach of the implied covenant of good faith and fair dealing, negligence, tortious breach of contract, and tortious interference with present and prospective business relations. The court allowed these claims to proceed." Apx4a

This statement ignores included alternate claims under tort breach. See pp. 65

[Upon receiving a requested pay-off amount], *"In November 2008 Phoenix and Ms. Knight satisfied the Note so the foreclosure action was dismissed".* Apx4a

It is notable that pay-off amount was $284,008.67 Remarkable actually, because it included accrued interest since April 8, 2005, during which time no payments were made, and the complaint had demanded $ 363,592.

Given these facts, it is indisputable that Capital breached the contract to both parties.

Before trial, the district court:

...limited the testimony of Phoenix's expert economist, Dr. James Horrell, citing Daubert v.

Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)), and Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999)

And at pretrial conference on March 6th, 2009, without benefit of voir dire

...barred Ms. Knight from testifying about 'lost profits' (sic) from the failure to develop the 40-Acre Parcel and the rental (sic) houses.

...indicated that it would be inclined to prohibit lay witnesses from giving opinion testimony about "expert" matters such as projecting development costs or the process of platting a subdivision, although they could testify to historical facts concerning the 40-Acre Parcel.

...excluded a 2004 appraisal of the Shopping Center prepared for another lender.

...prohibited introduction of any evidence of damages to Mini Malls.

...held that Phoenix and Ms. Knight could not claim as damages the bulk of attorney fees they had incurred during the dispute." Apx5a

And, refused to consider any issues or instructions included in the pre-trial report. See pp. 70.

Thereby, the Court suppressed the presumption that the Petitioner's evidence and testimony would support her position. This is the fulcrum of the court's analysis

On the way to a characterization the court failed to adequately review the competing arguments and

avoid material errors of logic. The court's disposition of this case is troubling because of unwarranted and arbitrary assumptions including:

Selling price was based on something other than comparable sales determined as of the time (in the past) Petitioner expected to sell the properties,

That such comparables could not be determined until anticipated repairs were completed,

That Petitioner was barred from making such determinations

That Petitioner was claiming lost profits from sales of property rather than loss of use of excess funds from net proceeds as in *Maiz v. Virani,* 253 F.3d 641(11th Cir. 2001)

That the sale of owned and vacant former family residences, not previously rented, is a "business".

And most amazingly, that actual expenses caused by the delay were not capable of reasonable calculation and

That neither Petitioner or expert economist were capable of adding up these amounts.

[March 12th] *"At the jury-instruction conference, Ms. Knight's counsel stated that in light of the district court's evidentiary rulings concerning the 40-Acre Parcel and the rental houses, Ms. Knight had to concede that she would not be able to establish her own individual damages, as distinguished from Phoenix's corporate damages."* Apx5a

This concession by counsel was without

Petitioner's knowledge.

"Accordingly, the district court granted judgment as a matter of law to Capital and Financial on her claims, leaving only Phoenix's counterclaims for the jury." Apx5a

Appellate Court Rulings

Petitioner adopted Phoenix's arguments by reference in accordance with Fed.R.App.P. Rule 28. (c) therefore an analysis of relevant rulings is appropriate here.

It also appears that the court has mixed the rulings between the two Parties.

1. Opinions re Phoenix Arguments (Apx6a-16a)

Exclusion of Evidence - 40-Acre Parcel

"The court provided two reasons for excluding evidence of damages from failure to develop the 40-Acre Parcel and the rental houses...., It said

(a) that such damages could not be recovered under the contract claim because there was no evidence that such damages were within the contemplation of the parties at the time the Note was made and

(b) that such damages could not be recovered under the tort claims because there was no evidence that they were foreseeable at the time of the alleged torts.

Second, it said that there was no admissible

evidence of any lost profits from the parcel and the rental houses because

(1) the parties could not call lay witnesses to testify about expert topics such as the platting process and development costs, and

(2) Ms. Knight had not been named as an expert witness and she did not have the business experience to testify about the development process.".

Phoenix disputes the court's evaluation of Ms. Knight's qualifications to testify about the 40-Acre Parcel. Its "opening brief, however, fails to address the court's other reason for excluding her damages testimony-that the damages ... were not within the parties' contemplation at the time of contracting or foreseeable at the time of the alleged torts. Phoenix .then has waived any challenge to the court's first rationale for barring Ms. Knight's testimony about the 40-Acre Parcel. For the same reason, we will not reverse the district court's decision to bar other testimony (by Dr. Horrell and the lay witnesses) concerning the 40-Acre Parcel and the rental [sic] houses." *Apx7-8a*

2. Opinions re Petitioner's Arguments (Apx 17a-23a)

Petitioner did argue contemplation and foreseeability (Apx 142-153A). The Appellant neither took issue or mentioned those arguments. Therefore, Petitioner must assume that was not an issue and need not be addressed here. The Appellate analysis limited Petitioner's exclusion due to lack of

"business" experience and further concluded that "profits were not capable of reasonably accurate measurement or estimate." (Item c. at Apx 20-22a). There would be no need for that discussion if this assumption is incorrect.

However, Petitioner states she also argued that Respondents' had actual notice, during litigation, both of the specific damages and their continuing nature. (Apx146a-153a)Therefore, even if it were sustainable that Mooring could not conceive of any damages arising from their bad acts before the lawsuit (which it is not), they cannot maintain ignorance after that. Under this concept, the damage calculation would merely move to the date of actual notice furnished by the lawsuit itself. Respondents persisted in their bad acts, coupled with vexatious litigation and unsupported allegations and testimony throughout the entire proceedings which delayed resolution and exascerbated the damages further.

Both parties continuously argued that it was within contemplation and foreseeable that Knight might want to refinance/payoff the Amended Note at any time, at the least, to receive a lower interest rate and/or a longer maturity, or a variety of other reasons. It was equally foreseeable that injury would be likely, if not definite, to occur if Mooring were to deny or delay Knight's right to pay the outstanding balance in full.

Both courts erroneously ignored those arguments.

REASONS FOR GRANTING THE

PETITION

This Court needs to resolve confusion over the standards of review, their effectiveness, the applicability and adherence to them by the courts. The question is whether the deference embodied in those standards has permitted, or even encouraged, lower court lack of diligence in the interest of judicial time-saving, both in the appellate courts and below. What appeal is there if the appealing court defers to the lower court?

Exclusion of damage evidence denied Petitioner's right to be heard and affected her "substantial rights" within the meaning of Fed.R.Evid. 103(a).

> *See United States v.Johnson,* 594 F.2d 1253 (9th Cir.1979)), cert. denied, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 376 (1979).

"The evidence excluded was lay-witness opinion testimony regarding such matters as the platting and subdivision process for the 40-Acre development and Ms. Knight's own opinion testimony about damages suffered from the delay in the development caused by Capital and Financial. As with expert testimony, the exclusion of lay-witness testimony is reviewed for abuse of discretion. See Zokari v. Gates, 561 F.3d

1076, 1088 (10th Cir. 2009)." Apx21a.

Both courts are wrong. They are wrong on several levels.

Neither the Respondents nor the courts maintained that Petitioner did not suffer damages due to Respondents' torts, but the court arbitrarily denied testimony as to those damages.

The arguments here show that the courts improperly excluded both Ms. Knight's and the expert testimony. First because they either ignored or misinterpreted the evidence presented resulting in improper application of the rules statutes and precedents, next the district court heard no testimony upon which to make those judgments, and third, because that goes to weight not to admissibility and is for the jury to decide. The decisions were clearly erroneous, arbitrary, an abuse of discretion and not in accordance with law or the interest of justice.

Petitioner had a right to testify as to value of property either under Rule 701 or 702. See pp. 35. Further, even if Petitioner could be barred from testifying about the selling price, that had no bearing on testimony about continuing "extra expenses". See pp. 28. And the expert had a right to rely on her data. See pp.45

The courts decision was not harmless.

"Because of the exclusion of this evidence, the district court properly dismissed Ms. Knight's claims. One necessary element of each claim was lost profits." Apx22a

But for the court's restrictive evidentiary rulings, the judgment would have been that Capital, at least, breached the contract. This exclusion not only eliminated any recovery of justifiable damages, but also profoundly affected the fees award. See pp.77

Due process requires notice and opportunity to be heard. The corner stone of due process of law is fundamental fairness, which includes amongst other things, both "notice" and "a meaningful opportunity to be heard".

> The right of a defendant to call witnesses is crucial for testing the prosecution's case and defeating the charges against him. Indeed, the "right to present a defense is a fundamental element of due process of law." *Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).* Even if the exclusion does not rise to the level of a constitutional violation, the burden is on the government to prove that the error did not have "a 'substantial influence' on the outcome." *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir.1990) (en banc) (quoting *Kotteakos (v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

"Knight appealed to the United States Court of Appeals for the Tenth Circuit, challenging the District Court's order granting Respondents' 50(a) request for summary judgment on all her complaints." Apx

In her appeal, Petitioner argued that the Tenth

Circuit should review the District Court's finding due to inconsistencies. She questioned how Mooring could breach the Contract only as to one party to the contract, i.e. Phoenix, without also breaching it to Petitioner.

Moreover, the evidence showed that most of the overstated demands were addressed to Petitioner. Additionally, Petitioner argued that the court should have used its discretion and ruled as a matter of law that Mooring indeed breached the contract by claiming amounts that were not legally owed. This fact was eventually admitted by Mooring and was plainly obvious by the evidence. No other conclusion was possible.

The appellate's only apparent response missed the point entirely. (Apx28a) The court's answer was essentially after the ruling the conclusions were different. Note 3 also demonstrates appellate's confusion as Petitioner made no reference to vacated rulings in Phoenix' separate case. (Apx11a)

The courts failed to follow the well founded precept to accept as true all disputed facts and inferences therefrom in favor of non-movant, Petitioner, and instead accepted Respondents unsupported allegations.

Every single issue in this case was disputed. Petitioner can recall only one issue that eventually was undisputed when Respondent, after months of denying responsibility, admitted they, in fact, should

have and did not furnish a correct balance. Their unsupported disputes were prolific, relentless and, although distorted or just plain inaccurate, obviously effective in influencing the court to overlook Petitioner's facts and evidence.

> A demurrer to the plaintiff's evidence should be sustained only when there is an entire absence of proof to show any right of recovery. *Boyles v. Oklahoma Natural Gas Co.* 619 P.2d. 613, 616 (Okla. 1980) see note 15. *See*, M*artin v. Stratton*, 515 P.2d 1366, 1368 (Okla. 1973); Tidewater Associated OilCo v.. Slusser, 307 P.2d 827, 828 (1957) .. *Hampton v.Hammons* 743 P.2d 1053 (Okla. 1987) "Following these precepts, we find that the trial court's ruling sustaining the appellee's demurrer to the evidence on the issue of negligence *per se* was error."

There was no absence of proof until after the court denied the admission of it.

> **Petitioner had sufficient evidence to overcome Respondents motion for summary judgment. The district court arbitrarily re-characterized her facts and deferred entirely to Respondents conclusory statements.**

> "We review the grant of summary judgment de novo applying the same standard as the district court embodied in.." "summary judgment is proper if "there is no genuine issue as to any material fact and . . . the

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). "In applying this standard, we view the factual record and draw all reasonable inferences therefrom most favorably to the nonmovant." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir.1998).

In ruling upon a defendant's demurrer to the plaintiff's evidence, both the trial court and the reviewing tribunal consider every fact favorable to the party against whom the demurrer is directed along with any reasonable inferences which may be drawn therefrom. All conflicting evidence favorable to the defendant is disregarded. *Thompson v. Presbyterian Hosp., Inc.*, see note 17, supra at 262-63; *Boyles* , , supra at 616 . *See also* Hood v Hagler, 606 P.2d 548, (Okla. 1986) held the conflicting evidence sufficient to create a jury question on provocation.

Because every fact favorable to the party against whom the demurrer is directed, together with all reasonable inferences which may be drawn therefrom, is admitted as true by a demurrer to the evidence, and all conflicting evidence is disregarded; Thompson v. Presbyterian Hosp. Inc., id at 262, *see* Neese v. Shawnee Medical Center Hospital, 626 P.2d 1327, 1331 (Okla. 1981); Jordan v. General Motors Corp., 590 P.2d 193, 196 (Okla. 1979); Martin v. Stratton, , 515 P.2d 1366, 1368 (Okla. 1973)supra at 1368.

It is not our function to comment upon the weight of appellant's evidence, nor are we in a position to say how we would decide the case were we the jurors. It is for the jury, once competent evidence has been introduced from which the necessary facts can be found, "to weigh conflicting evidence and inferences, and determine the credibility of witnesses." Boeing Co. v. Shipman, 411 F.2d at 375, (5th, 1969)(en banc).

The Boeing case was meant to end the controversy regarding when the jury may be evicted from a case, but once again we have before us a case of unwarranted jury displacement. Although we are without the use of a computer to afford us a complete statistical survey, we nevertheless suspect that such cases are legion and that their ranks are increasing. See, e. g., Trawick v. Manhattan Life Ins. Co., 447 F.2d 1293. (5 Cir. 1971). In a case such as we have here, where shards of evidence have been produced on opposite sides of almost every issue, jury exile should be almost as rare as a museum piece. Boeing Co. v. Shipman's guidelines are as engrained upon our jurisprudence as Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. (1938). Its every precept and inference was not heeded in the trial below, and we must therefore reverse and remand. *Jone v Concrete Ready Mix Inc vWC* 464 F.2d 1323 (5th 1972)

United States of America v Davis,. 809 F.2d 1509, (11TH Cir, 1987) held:

> There is no evidence that directly contradicts the defendant's depiction of his mental state. We may disbelieve Davis' testimony, but we cannot say that it is so fantastic, speculative or inconsistent that it "falls of its own weight." *See* United States v. Generes, 405 U.S. at 107, 92 S.Ct. at 835. It is not uncommon to find that a defendant can muster only his own testimony to rebut circumstantial evidence of intent. We are unwilling to discount an explanation from the one person who can best describe the defendant's state of mind.
>
> Defendant stated a claim against Lenders for alleged intentional and negligent violation of section 1639(h). That is not to say that she has established her right to recovery, but we cannot say that "she is precluded from recovering as a matter of law." Hicks, 2004 OK 36, ¶ 5, 92 P.3d at 90 (citation omitted).

Admissibility of evidence and testimony

The law of evidence in federal courts favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it. *Rule 43(a),* F.R.Civ.P.; *United States v. 60.14 Acres of Land*, 362 F.2d 660, (3 Cir.); *United States v.*

Featherston, 10 Cir., 325 F.2d 539

Title 12 O.S. 1981 § 2401 and Title 12 O.S. 1981 § 2402 support the Federal Rule. Apx 48a.

At the stage of a motion to dismiss or summary judgment, courts have determined that the question of the sufficiency of the evidence presented in support of lost-profits claims is properly for the finder of fact to determine. See, e.g., Fountain v. Lohan, No. 04-6778, 2005 U.S. Dist. LEXIS 23321, *20–21 (N.D. Ill. Oct. 11, 2005); Aamco Transmissions, Inc. v. Marino, Nos. 88-5522, 88-6197, 1992 U.S. Dist. LEXIS 2081, *12 (E.D. Pa. Feb. 20, 1992); PBM Prods. v. Mead Johnson & Co., 174 F. Supp. 2d 424, 429 (E.D. Va. 2001).

Bank pointing to Beshara's testimony at trial and in his deposition, insists that Beshara suffered no damages as a result of the Bank's dishonor of the checks. Considering all of his testimony as a whole, he did present evidence on other consequential damages such as the loss of use of his funds and mental pain and suffering caused by both the dishonor and the allegedly wrongful hold on his account. We find that this evidence was sufficient, under these circumstances, to overrule the Bank's demurrer and to submit the cause to the jury for a determination of whether Beshara suffered any damages which were proximately

caused by the alleged wrongful dishonor. 12A O.S. 1981 § 4-402 , page, §§§, Shaw v. Union Bank & Trust Co. 640 P.2d 953, 954 (Okla.1981); at note 12.

In Zokari, *supra,* the court said that it would decide the admissibility issue after counsel conducted a voir dire of witness Holland outside the jury's presence. During that procedure Holland stated he knew nothing to support the claimant.)

No such procedure was extended by the district court here.

Motions in limine were not provided with statutory time to respond

Under the facts presented, the appellant should have been given an opportunity to respond to the appellees' motion to dismiss his counterclaim which the trial court treated as a motion for summary judgment. Oklahoma statutes requires that demuurer allow 15 days to answer. Beshara

Motions in Limine was proffered on 2/23/2009 allowing only 14 days until trial date scheduled for 3/9.

Since the rulings on the Motion in Limine as well as other rulings eliminating witnesses and damages was not made until one business day before the trial or during trial, Petitioners did not have adequate opportunity to respond or to revise the schedules to reflect those decisions.

Improper Exclusion of Owner's Testimony

In its March 6th pre-trial ruling the court itself recognized the basis for allowing Petitioner's testimony under Rule 701 stating "some limited[9] exceptions for owner testimony"(See Apx51-52a)

then excluded it on manufactured premises neither proposed nor in evidence.

The court arbitrarily classified Petitioner's damages as projections of profits from future sales, rather than, as presented , based on proceeds determined by comparable sales in the past at expected time sales would have occurred but for Respondent's acts delaying such sales. This ruling in addition to being circular ignores or misconstrues the evidence. Apx52a

It is unknown how either court could exclude the "excess expenses" that were actual amounts and unrelated to the improper exclusion related to property values

Evidence presented below

1 Houses:

Property values were established at a particular time in 2004, anticipated sales dates were shown on

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[9] Petitioner finds no limiting factors.

the damage schedules on a consistent basis. This determination was based on actual comparable sales at those times, i.e., anagous to hindsight as opposed to the court's classification of "future sales".

It is undeniable that Petitioner's ownership of those (vacant) former family residences for periods of 10-30 years provided intimate knowledge of the costs involved with them as well as their values

It doesn't take a genius to know when a property is sold any existing mortgage is paid off. Therefore the mortgage payments including interest charges disappear. Neither is it beyond the understanding of the ordinary layperson that the recurring expense of real estate tax, insurance, or other costs unavoidably associated with ownership would also cease with the sale

The costs claimed ("excess expenses") are those actual, usual, customary, unavoidable costs incurred by the forced holding of the properties

The damage schedules were provided several times during the litigation, each time updated with ongoing ownership costs incurred.

Proof of the amounts incurred was provided to Respondent

The courts arbitrarily characterized ownership of (vacant) former family residences as a "business".

Getting ready for sale costs were not charged to Respondent, did not affect the selling price and did reduce the cash available for re-investment earnings calculation.

No costs of ownership incurred before the planned sale date were included.

Profit is an inappropriate reference as that would be net sales proceeds minus fixing up costs and original purchase price.

The damages schedules did not include any projected or estimated losses caused by increased costs to ready for sale or decline in selling price due to the delay. These claims would fit the court's label of "future sales" whereas damage calculations were based as stated herein.

While the court argues that Petitioner cannot be permitted to value the property, it conveniently directs us to Malloy v. Monahan, 73 F.3d 1012, 1016-17 (10th Cir. 1996).

When correctly cited, Malloy is more supportive than adverse, holding:

> We review the district court's determination of the admissibility of exhibits for a clear abuse of discretion. State Office Sys., Inc. v. Olivetti Corp. of Am., 762 F.2d 843 (10th Cir.1985. We first determine whether the exhibit had a proper foundation. ...the first portion of the exhibit, detailing... the projected sale prices of the two houses owned by Malloy at the time of the incident, is admissible. As owner of the houses, Malloy was qualified to testify regarding their value because of his special knowledge of the properties. See United States v. 10,031.98

Acres, 850 F.2d 634, 636 (10th Cir.1988).
Malloy, supra at 636.

As here Malloy determined selling prices from comparable property sales.

It is distinguishable first because Petitioner was not buying distressed properties requiring significant and perhaps unknown repairs that dramatically altered values and secondly she was not claiming damages remotely resembling profit.

> Malloy also held "While we do not endorse Exhibit 15 as a model calculation of lost future profits, we conclude that it nonetheless passes muster under Fed.R.Evid. 701 or Fed.R.Evid. 702. The weight accorded to Malloy's figures was a question of fact properly left to the jury. *Id. Cf., United States of America, v 10,031.98 Acres Of Land* 850 F.2d 634 (Sharp could not be prevented from offering his opinion as to the value of his property even if he did not first establish in painstaking detail the accuracy of the process by which he arrived at that opinion.) [Emphasis added]

2 Development of the 40 acres

The values for the 40 acres differ from the houses only in two respects. Projected costs to develop had been provided by the Engineer. Petitioner spent significantly more time verifying the timing, selling price and development costs since it was important to

determine the potential profit before undertaking that project.

District court overruled counsel's pre-trial arguments as to her procedures. Apx 53-55a. Details of her research and ability to make that determination that were provided in the appeal but totally discounted by the Appellate.

That testimony would go to the weight, not admissibility as well.

3 Summary is admissible

> Rule 1006 clearly permits the use of a summary of voluminous business records.
>
> The president of the plaintiff corporation offered his projection of future profits lost as a consequence of the defendant's breach of contract. State Office Systems, *supra* at 845-846. . Given the president's knowledge of the type of business at issue and his position in the company, we ruled that he possessed sufficient expertise and personal knowledge of the company to render such an opinion. *Id.* at 846. Moreover, we found it significant that the defendant had ample opportunity to cross-examine the witness about the basis of his figures. Thus we concluded that the trial court properly admitted the president's projections as opinion testimony under either Fed.R.Evid. 701 or Fed.R.Evid. 702.
>
> *See United States v.Johnson)*, 594 F.2d 1253

(9th Cir.1979)), cert. denied, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 376 (1979*)*. (There is evidence in the record to lay a foundation for the summary of actual losses as a compilation of business records admissible under Rule 1006. Our decision in State Office Systems guides our disposition of this issue. ....The exclusion of this evidence affected plaintiffs' "substantial rights" within the meaning of Fed.R.Evid. 103(a).)

"As for Ms. Knight, it is true that business owners may be qualified to testify about lost profits when (1) "the owners had sufficient personal knowledge of their respective businesses and of the factors on which they relied to estimate lost profits" or (2) "the owners offered valuations based on straightforward, common sense calculations." LifeWise Master Funding v. Telebank, 374 F.3d 917, 929-30 (10th Cir. 2004) (collecting cases). Apx21a

The Appellate reference to LifeWise is over-ambitious and distinguishable. The complicated methods used there can in no way compare to Petitioner's listing of actual expenses and simple arithmetic used to arrive at anticipated cash flows. Additionally, the LifeWise officer admitted he had never used that method, whereas here Petitioner was adept at making such calculations and had personal knowledge of every amount presented.

"But as the district court noted, Ms. Knight had no experience in land development and had never

conducted a business with respect to the vacant houses."

"But the district court did not abuse its discretion in holding that, on the admissible evidence before it, any lost profits from the sale of the rental houses and the development of the 40-Acre Parcel were not capable of reasonably accurate measurement or estimate." Apx22a

Petitioner cannot conceive of any situation more accurate than actual amounts paid.

As to any remaining questions, such as the proposed month of sale or the exact development cost, the following are dispositive:

> In a case such as this, where the wrong is of such a nature as to preclude exact ascertainment of the amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Story Parchment Co. v. Paterson Parchment Paper Co.*,-282 U.S.555 at 563, 51 S.Ct (1931). The wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury. *Accord* Bangor Punta Operations, Inc v. Universal Marine Co., Inc., 543 F.2d 1107

(5th Cir. 1976), Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927)., *Commonwealth Trust Co. of Pittsburgh v. Hackmeister Lind, Co.*, 181 A. 787, 790 (Pa. 1935) (It is "legalized robbery" to relieve any wrongdoer from liability because his wrongful act caused damages to be uncertain, and "substantial justice is better than exact justice.").

Although clearly defined damages are preferable, when the injured party can come before the factfinder and introduce evidence tending to show damages, a probable estimate of the amount in controversy will be allowed by inferential proof. Supra, Story Parchment at 564,cf., Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d D.C.A. 1990).

An owner can testify as to the value of his property under Rule 701 or 702. Courts' opinion is in conflict with possibly every court in this great land, including its own state.

Fed.R.Evid. 702 advisory committee note ("[W]ithin the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.") (emphasis added).

A landowner who has known his land for years, or an expert witness who has acquainted himself with a piece of property, takes into account facts that he knows only by hearsay, or that for some other reason would not be admissible as independent evidence upon the examination in chief. If the witness' candid admission that he has considered such matters destroys his testimony, only a dishonest or an ill-informed witness can give an admissible opinion about the value of property.' "*LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 435 (5th Cir.1982) . Here, the judge directed a verdict after improperly excluding plaintiffs' only evidence on an essential element of its case. The exclusion was clearly prejudicial. *Id*

[T]he opinion testimony of a landowner as to the value of his land is admissible without further qualification. *Id.* at 433 (5th Cir.1982); And, "[i]t would totally emasculate the rule that an owner is always qualified to testify as to the value of his property to turn around and require a threshold basis for that testimony before it may be admitted." *Id* at 434-35.]

The trial court refused "to admit Lacombe's testimony "based at least in part on depreciation schedules as to the accuracy of which he was not qualified to testify." *Id.* at 434. The Fifth Circuit reversed noting: "The basis of Lacombe's value testimony goes to its

weight ... not to its admissibility.... *Id*

[A]ppellant attacks the probative value of this testimony on the grounds that it was not based on any accepted method of valuation, but this overlooks the fact that the opinion testimony of a landowner as to the value of his land is admissible without further qualification. *Id.* at 435 (citations omitted) (emphasis in original); see also *Baltimore Am. Ins. Co. v. Pecos Mercantile Co.*, 122 F.2d 143, 147 (10th Cir.1941) Its weight was for the jury.");

The District of Columbia Circuit has implied that admissibility of owner value testimony should be even more favored than expert testimony in general. In *District of Columbia Redevelopment Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337,338 (D.C.Cir.1976), The majority of the panel on appeal concluded that the landowner should have been permitted to testify as to the value of his property even though his opinion was based in part on his experience with the non-comparable property..

Furthermore, in testifying as to the value of his property the owner is entitled to the privileges of a testifying expert. Lacombe at 434. see also *United States v. Laughlin,* 804 F.2d 1336, 1341 (5th Cir.1986) (owner's testimony is expert opinion under Fed.R.Evid. 702); *Robinson v. Watts Detective Agency*,

685 F.2d 729, 739 (1st Cir.1982) (owner allowed to give estimate of property value based in part on hearsay); *Kestenbaum v. Falstaff Brewing Corp.* Falstaff Brewing Corp., 514 F.2d 690, 698 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976) (quoting Fed.R.Evid. 702), cert. denied, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976).

The Kestenbaum court held: "However, whether present evidentiary rules or the new Federal Rules are applied, Kestenbaum's estimation of the sum of the above valuation elements will be admissible since under both an owner is competent to give his opinion on the value of his property. This rule, established by the weight of present authority has now been codified in Rule 702 of the new Federal Rules of Evidence. Rule 702 provides: "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify (to specialized knowledge) in the form of opinion or otherwise."",;(*e. g., Berkshire Mutual Ins. Co.v. Moffett*, 378 F.2d 1007 (5th Cir. 1967); *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12 (4th Cir.), cert. denied, 382 U.S. 980, 86 S.Ct. 552, 15 L.Ed.2d 470 (1965); *Hartford Fire Ins. Co. v. Cagle*, 249 F.2d 241 (10th Cir. 1957); Lawton v. Strong, 249 F.2d 299, 302 (6th Cir. 1957); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir.

1947) .

In *Robinson, supra*, the district court permitted Sullivan to testify to his opinion on the value of the business because, as president and majority stockholder, he was the owner of the property. The court noted that this opinion testimony of an owner is admissible either as an opinion by a lay witness "based on ... personal perception" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" under [Federal] Rule [of Evidence] 701, or as an expert opinion by one who is "qualified as an expert by knowledge ... [or] experience" under Rule 702. *See also Arkansas State Highway Commission v. Russell, 240 Ark. 21, 398 S.W.2d 201, 202 (1966)*

The problem with the district court's refusal to allow Sharp to offer his opinion as to value unless he complied with the standards required of an expert appraiser, is that an expert appraiser does not have the familiarity with the subject property that an owner is presumed to have. Despite the informal comparison that is involved in such a process, the standard federal rule is and has been that a landowner may testify as to the market value of his own property *United States v. Sowards,* 370 F.2d 87, 92 (10th Cir. 1966) .

Testimony goes to the weight of the

evidence, not to admissibility.

> See State Office Systems *supra* at 845 holding appellant's objections go more to the weight of the evidence than to its admissibility. The weight to be accorded appellee's figures was a question of fact properly left to the jury.
>
> Whether or not [an owner's opinion as to the value of his property] opinion is accurate goes to the weight of the testimony, not its admissibility *Robinson v. Watts*, at 739 supra . *See Meredith v. Hardy*, 554 F.2d 764, 765 (5th Cir. 1977) *Cf. Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 886 (1st Cir. 1966); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1369 (11th Cir.1982) ("[A]n owner of property is competent to testify regarding its value. 'The weight of such testimony is, of course, affected by the owner's knowledge of circumstances which affect value, and as an interested witness, it is for the jury to evaluate the credibility of his testimony.' "); *Thirteen Parcels of Land*, (D.C.Cir.1976) ("In these circumstances, we believe that such factors as the differences in size, frontage and location of the two properties go to the weight of the owner's testimony regarding suitability and not to its admissibility.")
>
> "This testimony is then 'subject to attack

> through cross-examination or independent evidence refuting the owner's estimate ..., with the jury as fact-finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. .Lacombe *supra* at 1290, *See* Kestenbaum, supra, at 699. (citations omitted). *Accord Dietz v. Consolidated Oil & Gas, Inc.*, 643 F.2d 1088, 1011(5th Cir.), cert. denied,U.S. 102 S.Ct. 513, 70 L.Ed.2d 385 (1981)

District court ruling is also wrong regarding method of establishing value:

The courts essentially ignored counsels pre-trial supporting arguments. Apx51-55a.

THE COURT: "Well, insofar as it relates to the evidentiary question, I understand your position, but I'm nonetheless of the opinion that I think she's going out to look at comparables and drawing information from other experts and so on, that process I think takes it outside the scope of what 701 contemplates as proper lay testimony." Apx55a

> It should also be noted that evidence of comparable sales is admissible either as direct proof of value or in support of the opinion of an expert,. *Featherston*, supra, and, while an important factor in the determination of market value, does not affect the admissibility

of other relevant evidence on the question.

Cases show clearly an owner can testify as to the value of his owned property whether owned individually or testifying as a company official based on comparable sales or other methods. Further he cannot be excluded even if there are no comparable properties to base his values on. The admissibility goes to the weight of the testimony and is for the jury, not the court, to decide as to the reliability of the assigned value.

> And we stated in *Sill Corp. v. United States*, 343 F.2d 411, 416, (10 Cir.,1965) cert. denied 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed.2d 81(1965):We know, of course, that the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. *See United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336; (1943) *See alsoSowards, supra* at 401 It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.'

In recognizing the difficulties of establishing market value in cases where there are no comparable sales, the Supreme Court, in *United States v. Miller*, supra at 374, 375 stated:

> 'Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the

use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The sovereign must place the owner in as good a position pecuniarily as he would have been had his property not been taken. United States ex rel. and for Use of T.V.A. v. Powelson, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390; United States v. Cox, 10 Cir., 190 F.2d 293, cert. denied 342 U.S. 867, 72 S.Ct. 107, 96 L.Ed. 652. Just compensation is measured by the market value of the property at the time of taking. *Miller*, at 336, supra ; *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *United States v. Featherston*, supra ; *Harwell v. United States*, 10 Cir., 316 F.2d 791; *United States v. Silver Queen Mining Co.,* 285 F.2d 506, (10 Cir. 1960); 27 Am.Jur.2d, Eminent Domain 267. The federal concept of market value is intimately related to selling price on the market, and it is generally recognized that the best evidence of market value is

found in sales of comparable property within a reasonable time before taking; but the determination is not limited to that method. *United States v. Toronto Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 70 S.Ct. 217, 94 L.Ed. 195 (1949); *Miller*, supra; *Sowards.* , supra; *Harwell* , supra; *Onego Corp. v. United States*, 295 F.2d 461 (10 Cir. 1961); *Silver Queen Mining Co.*, supra.

The lack of comparable sales does not change the measure of compensation; other evidence may be sufficient for the determination of value. *Toronto Hamilton & Buffalo Nav. Co.*, supra; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 *Silver Queen Mining Co.*, supra, Kestenbaum, supra .

The court abused its discretion in making this clearly erroneous ruling.

The court's decision was arbitrary and manifestly unreasonable, not in accordance with principles discussed herein and against the interest of justice.

The case presents an opportunity for this Court to resolve that expert testimony is permissible as to the computation of numerical values and summaries that are helpful to assist the fact finder, based on data and reports, not of his own making and to which he is

not testifying as to their truth, provided he has the skills to perform such calculations, without requiring him to prove the underlying data.

Improper exclusion of Expert testimony

"Phoenix designated Dr. Horrell to testify not only about the 40-Acre Parcel but also about excess expenses that Phoenix had incurred and the lost rental income from the Shopping Center due to the inability to refinance. But the district court limited his testimony on these other matters to mathematical calculations.". Apx8a

Dr. Horrell's report calculations included the damages claimed by both parties. This was necessary due to the interdependency of the uses of the receipts derived from the included activities of the parties. Inasmuch as the parties were claiming a loss of investment earnings from the pooled cash generated from all activities the sources and uses of cash as listed on individual sheets were summarized, by periods, to determine the amount available to first

retire the refinanced debt and then to re-invest.

The Experts testimony was not intended to confirm factual evidence of Respondents' acts or omissions or that Petitioner's goals would have been achieved. Dr. Horrell's role in this litigation was to offer the opinion that, assuming the presented scenario, the Petitioner would have earned a minimal amount on the remaining proceeds.

Although the Appellate fails to mention it, the district court's opinion was partially based on Respondents argument that the expert had no real estate experience and therefore could not make a proper analysis.

> Similarly, where the plaintiffs, Mexican nationals, had been defrauded in a U.S. real estate development scheme, the court allowed an economist with no real estate development expertise to testify as to the amount the plaintiffs would have earned if they had invested the same amount in an average American real estate investment trust (REIT).*Maiz v. Virani,* 253 F.3d 641, 665 (11th Cir. 2001); cf. *Computer Sys. Eng'g, Inc. v. Qantel Corp.*, 740 F.2d 59 (1st Cir. 1984) (holding that a CPA could testify as to lost profits where testimony consisted of extrapolating from forecasts made by the adverse party); *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 717 A.2d 724, 733 (Conn. 1998) ("Some economists' and accounting professionals' skills may be transferred

between industries.")

> Once it was established that the measure of damages was the profits that would have been earned on such an investment, calculating those profits was something that an economist, even an economist without specialized experience, was well qualified to do. See *Maiz*, *supra* at 665; cf. *Durflinger v. Artiles*, 727 F.2d 888, 892 (10th Cir.1984). held Rule 703 "permits an expert to base an opinion on any facts or data, admissible or not, which are of a type reasonably relied on by experts in the particular field" *Id.*
>
> Further, a Dec. 1, 2000 amendment to even lets the inadmissible hearsay be disclosed to the jury if the trial judge finds that the probative value of assisting the jury to evaluate the expert's opinion outweighs the risk of prejudice from the jury's potential misuse of the information.

The reality of possibly more than a half dozen educated attorneys' claimed failures to understand the schedules lends support to the fact that Dr. Horrell would provide impartial assistance to the jury, if needed.

Kuhmo alters the referred to Daubert factors as applicable to the proposed testimony discussed herein.

" We agree with the Solicitor General that "[t]he factors identified in Daubert may or may not be

pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as Amicus Curiae 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue. "

> In some situations, courts should be willing to allow experts to testify on the basis of their general background in a field such as accounting or economics. For example, where the projected revenues and expenses are already in evidence and the expert merely needs to calculate the profits so as to come up with a number that is comprehensible to the jury, an accountant with no expertise in the industry in question would be perfectly capable of rendering an opinion as to the amount of profits the plaintiff has lost. *See, e.g., In re Merritt-Logan, Inc.*, 901 F.2d 349, 360 (3 d Cir. 1990) (stating that a CPA could testify as to how lost profits were calculated where he did not express an opinion on underlying projections); *cf. Supply & Bldg. Co. v. Estee Lauder Int'l, Inc.*, 57 Fed.R.Evid. Serv. (West) 1309, 1312 n.3, 1316 (S.D.N.Y. 2001) (finding that an accountant without relevant experience in the Middle East was

> qualified to testify as to the opposing expert's mathematical and accounting errors).
>
> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993) (noting that experts, unlike ordinary witnesses, are permitted to offer opinions not based on first-hand knowledge or observation).

Based on the testimony being offered, the arguments presented as supporting the ruling are not applicable. However, Petitioner discusses procedures taken their applicability to law that justifies the admission of the expert even if his testimony had been to verify the underlying facts.

It is believed the court confused the issues and that the arguments were actually aimed more at the Phoenix case in regard to projected net profits based on the experts' reliance on the appraisal report.

> As shown herein Petitioner was qualified to testify as to the value of property she owned. Therefore, the expert is permitted to rely on the property owner's valuation. *See Featherston, supra*(It should also be noted that evidence of comparable sales is admissible either as direct proof of value or in support of the opinion of an expert, supra, and, while an important factor in the determination of market value, does not affect the admissibility of other relevant evidence on the question.)

See United States v. Rodriguez-Felix, 450 F.3d 1117, 1124-1125 (10th Cir 2006 (stating that "[w]e [have] rejected a per se rule excluding such expert testimony"), cert. denied, 549 U.S. 968 (2006); accord, e.g., *United States v. Martin,* 391 F.3d 949, 954 (8th Cir. 2004) (reviewing for abuse of discretion). ("while cross-examination is often effective, expert testimony, when directed at complex issues, may provide a more effective tool for rebutting an eyewitness's testimony

"And as to the calculations of expenses, the district court did not abuse its discretion in disallowing testimony that would simply adopt and confirm what Ms. Knight had said. Cf. Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073(10th Cir. 2006) (it was not "'manifestly unreasonable' for the district court to conclude that [the expert's] opinions lacked foundation because they were based on 'the self-serving statement[s] of an interested party'") .Apx11a

This case is not "comparable to" Champagne where the court excluded the expert since his report was based on a different market than the claim was based on and he offered no explanation as to why. Further the report conclusively stated that Champagne "experienced difficulty acquiring sales persons" based on owners statement. but "had not spoken with a single potential sales person who declined an offer." Proofs in that antitrust case relied mostly on intangibles whereas the instant case is fact based supported by documents. This argument

applies equally to Appellate's other cites.

*"As for the alleged excess expenses, the court noted that "the listing of 'excess expenses' incurred by defendants is based entirely on information defendants provided to Dr. Horrell." Id. at 164. The court was concerned that Dr. Horrell would testify "that defendants' estimates of future real estate sales activity or of 'excess' expenses or the like are reasonable. Id. at 166."*Apx9a

It is not surprising that Dr. Horrell would adopt Petitioner's list of expenses. Every case must start with the victims' assertions of injuries. In this case since that is the only source of information it begins and ends with that list. That those costs were incurred is proved by presentation of bills and payments made. Inclusive relevancy is sustained by common sense and logic. There is no blown tire, no defective product, no manufacturer to consult, no medical procedure to question, no scientific studies. The damages presented are analagous to medical bills arising from an injury, or property destroyed by a fire.

It is also absurd to state that the expert cannot testify based on Petitioner statements because they are self-serving. All witnesses testifying on their own behalf would be self-serving.

Under Rule 702 of the Federal Rules of Evidence, an expert qualified by "knowledge, skill, experience, training or education" may give testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. These twin pillars of

"qualifications" and "helpfulness" inevitably mean that expert testimony often will be comprised of, or reliant upon, large chunks of "hearsay" information developed or written by others

The en banc opinion of this Court in *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971), cert. denied, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972), summarized the law as follows:

> "Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources. " *See United States v. Alker*, 260 F.2d 135, (3 Cir., 1958); *v. United States*, 5 Cir., 1965, 346 F.2d 775, 779-780, cert. den. 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366; *Brown v. United States*, 1966, 126 U.S.App.D.C. 134, 375 F.2d 310, 318; *H & H Supply Co. v. United States*, 194 F.2d 553, (10 cir. 1952). The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data but from

education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise. Williams, supra, 447 F.2d at 1290 (footnote omitted).

In H&H, *supra* The testimony of [the petroleum engineers] with respect to the sources of their information was not offered for the purpose of establishing the truth of the information received by them. They were testifying as valuation experts and the sole purpose of this testimony was to establish the sources upon which they relied in reaching their conclusions as to value.

In *George Lee Mims v United States of America*, 375 F.2d (1967) On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted. (See Note 2 Collecting cases) The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions

It is clear," said the court, "that Dr. Horrell has neither undertaken any systematic investigation or independent analysis of the reasonableness of what defendants claim as their excess expenses nor has a basis for assessing the reasonableness of defendants' projections . . . ." Id. at 171 (footnote omitted). The court concluded: "His relatively limited efforts at verifying whether Ms. Knight has some document or basis for the estimates she makes fall far short of providing a basis for [him] to opine that the estimates or projections are reasonable. He therefore cannot take Ms. Knight's estimates and present them in such a way as to make them sound like they are his. Id".. Apx9a

We review the district court's determination of the admissibility of exhibits for a clear abuse of discretion. State Office Sys., Inc. v. Olivetti Corp. of Am., 762 F.2d 843 (10th Cir.1985. We first determine whether the exhibit had a proper foundation. Malloy, supra at 636

As discussed above, Petitioner was entitled to testify as to the selling price, the "excess expenses" were actual not speculative, and refinance terms were known. These facts form an acceptable basis for the economist to determine the impact of the delays on cash flow and re-investment earnings.

There was no defect in the methods or procedures used to verify the schedules provided by petitioner. Verification was strictly a matter of simple arithmetic. Interest owed on notes was provided on spreadsheets and supported by 1098s issued by the

note holders. Other 'excess expenses' were the amounts actually incurred, supported by invoices and printouts of the providers accounts, in most cases showing up to two years per printout.

Any investigation of the amounts included is no more difficult that viewing the bills and payments on each property. The reasonableness of the amounts is not at issue since they are the amounts charged by the creditor and not subject to the control of Petitioner.

Dr. Horrell randomly chose amounts and was shown the invoice/payment records. Due to the limited types of expense and the proofs an exceptionally high percentage of costs were thus verified. The fact that Dr. Horrell later failed to reveal the exact documents viewed is insufficient to conclude that he did not make adequate verification of the "excess expenses".

In fact the court had personal access to many of those records. The Petitioner, on counsel's instructions these proofs were needed at the pre-trial hearing, left copies of several hundred documents spanning 5 years with the Judge's clerk on March 6 and those records were returned to counsel at the close of the trial

An independent analysis of the reasonableness of inclusion is only to ask, "Would any of these expenses continue to accrue after the sale of the property? Are any of those costs avoidable during the period of ownership? Since the answer to both questions is "No", it is obvious that they are costs incurred that

would not have accrued except for the forced delay in selling them due to Respondents acts.

If petitioner did not have the expertise to prepare the schedules, it is apparent that the expert would have prepared them himself in a similar fashion. The court's decision infers that if the expert can find no fault with Petitioner's reasoning and calculations, then they must be unreliable.

As to the calculations of cash available, Dr. Horrell did not totally accept Petitioner's summary. His report and calculations arrived at different amounts of lost profits from the shopping center after his review of the appraisal report, the included listing of local shopping center rates and Phoenix history. He employed his own method of arriving at the additional cash that would have been available for re-investment. He provided his own calculation of re-investment earnings using three rates for jury's choice. One only has to review Petitioner's summary to see the differences.

Under the principles stated herein, the court had no reasonable basis to exclude his testimony.

Inclusion Of Reports By Others

"Phoenix contends that Dr. Horrell was qualified to offer the opinions that he submitted; that he was entitled to make assumptions, provided those assumptions could be proved at trial; and that he had tested his information against the actual facts as they became known. Because Phoenix does not claim that "the district court failed to employ the proper legal

framework required by Daubert, we consider only whether the district court abused its discretion in actually applying this framework to the testimony at hand." United States v. Rodriguez-Felix, 450 F.3d 1117, 1125 (10th Cir. 2006) supra at 1125. Apx10a

Again, although Phoenix did not argue Daubert factors, Petitioner did.

"The district court did not abuse its discretion in limiting Dr. Horrell's testimony. Fed.R.Evid. 702 requires an expert's testimony to be "based upon sufficient facts or data" and to be "the product of reliable principles and methods" which have been "applied . . . reliably to the facts of the case."

"[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). .Apx11a

Dr. Horrell was testifying only that assuming the underlying amounts were accepted as true that the cash available would have earned a certain amount by trial date. . It is unclear where there is a "gap" The court provides no insight to that allegation.

"Under Daubert, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Mitchell v. Gencorp Inc., 165 F.3d

778, 782 (10th Cir. 1999)) (ellipsis and internal quotation marks omitted)." *Apx 10a*

> It should be clear, too, that a witness may be qualified to testify as to one aspect of the damages in a case and not as to others. A criminal case provides a vivid example. *State v. Roland,* 808 S.W.2d 855, 858–59 (Mo. Ct. App. 1991. *Cf. Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 n.1 (3d Cir. 1996) (admitting testimony of expert because requiring better qualified experts would "unjustly increase litigation costs by requiring litigants in countless cases to hire a host of experts . . . ").

"The district court offered cogent rationales supported by the record for limiting Dr. Horrell to presenting numerical calculations regarding damages. Dr. Horrell's years of experience and other qualifications do not overcome the district court's concern about lack of independent investigation in this case". Apx11a

> The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. C*elotex v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

No evidence was provided to support a lack of independent investigation other than the Respondent's unsupported statements. The district

court abused its discretion in accepting those statements as opposed to Plaintiff's real evidence of expense receipts and the allowance of value testimony under Rules 701 or 702.

The decision was clearly erroneous due to the obvious failure to consider Petitioner's evidence and instead rely on Respondents contentions,-e.g. the allegation they had no documents. Respondents had ample evidence with which to verify those amounts themselves, hence their opposite claim the documents provided were too voluminous. In fact, Respondents objections were disingenuous since they had themselves procured evidence from county assessors and subpoenaed mortgagees' documents. Those amounts comprised the majority of the "excess expenses"

Petitioner cannot conceive of what additional investigation would satisfy the court. Secondly, since the expert was not testifying as to the validity of the schedules or the underlying data, it can be maintained that no action needed to be taken to render the type of opinion he was to make in this case.

"See United States v. Nacchio, 555 F.3d 1234, 1258 (10th Cir.) (en banc), cert. denied, 130 S. Ct. 54 (2009) ("Although [the expert] generally has been permitted to testify in the past, and a district court might well respect his credentials, the court had an obligation to assess the methodology that [the expert] had employed in the case at hand."). Apx11a

Expert may rely on other information.r

Cf. *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1153 (10th Cir.1990) (Information must be of a type reasonably relied upon by others in the witness' field of expertise.); *LaCombe*, supra at 434 United States v. Laughlin, 804 F.2d 1336 (5th Cir.1986) J. Weinstein & M. Burger, Weinstein's Evidence 703[03] at 703-25 (1988) (The rule implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness.

It was unreasonable for the courts' determination that experts could not rely on the Petitioner's bills. They are no different than bills paid in a personal injury case.

See, e.g., Wharfside Two, Ltd. v. W.W. Gay Mech. Contractor, Inc., 523 So. 2d 193, 195 (Fla. Dist. Ct. App. 1988) (holding that the use of projections in consummating financing made them reliable enough to support a jury verdict).

The individual schedules of expenses paid or accrued, the summary adding these up and the calculation of cash flow created by Petitioner were not beyond the understanding or professional judgment of Dr. Horrell.

In *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114 (10th Cir.2005), we held that Rule 603 permitted a lay witness to testify about the contents of a list of audit reports. As we explained, "[s]ince [the witness] personally examined these (*Id.* at 1123) audit reports, she had personal knowledge of their content."

Moreover, we have also held that "[t]he standards [of personal knowledge] applied to lay and expert witnesses differ. In particular, Rule 703 "permits an expert to base an opinion on any facts or data, admissible or not, which are of a type reasonably relied on by experts in the particular field" Durflinger v. Artiles, 727 F.2d 888, 892 (10th Cir. 1984) (emphasis added) (internal quotation marks and citation omitted). ."

How one characterizes the "type" of data also affects whether it is of a type reasonably relied upon by experts in the field. Real estate appraisers commonly rely upon comparable sales. *See Cayuga Indian Nation of N.Y. v. Pataki*, 83 F. Supp. 2d 318, 324–25 (N.D.N.Y2000).

Some courts have said that relying on

> projections supplied by a client is not cause for excluding the testimony but is something that can be corrected on cross-examination. *See, e.g.*, *PRS Benefits, LP v. Cent. Leasing Mgmt., Inc.*, No. 3:03–CV-1183-B, (2004) U.S. Dist LEXIS 24135, at *4–6 (N.D. Tex. Nov. 29, 2004) (holding that a CPA's failure to verify data provided by a health plan administrator could be dealt with by presenting evidence as to its lack of reliability); *In re Tasch, Inc.*, No. 97-15901 JAB, 1999 U.S. Dist. LEXIS 12368, at *1, *10–11 (E.D. La. Aug. 4, 1999) (admitting the testimony of an expert as to profits lost on breach of contract in spite of an admission by the expert that he "made no effort to verify the financial information provided by his client").

It is also important that Petitioner was available to testify about the underlying facts whereas in some cases expert testimony was denied because the provider of the data was not called as a witness and not subject to cross examination.

> It is arbitrary, capricious, unrealistic, and unreasonable to suggest that actual invoices and other documents as detailed by Petitioner are not of the type experts, in every field, typically use when any type of costs are a part of the damages calculations.

The courts' decision departs from this court, it's own and likely every other circuit and state.

The simple pleading code does not require separately stated claims-only notice

Rule 8(a), Fed.R.Civ.P. provides that pleadings are to be construed liberally.

> The Supreme Court summarily vacated the Tenth Circuit decision, observing: Federal Rule of Civil Procedure 8(a)(2) requires only " a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 127 S.Ct. 1955, 1964 L.Ed.2d 929(2007) (slip op., at 7-8) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). And Federal Rule of Civil Procedure 8(e states that "[p]leadings must be construed so as to do justice."See Erickson, 127,S.Ct. at 2200

The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accepts the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to rule 8(f) FRCP7 all pleadings shall be construed to do substantial justice."

> Rules on pleading both at trial and at the appellate levels have been liberalized to allow

the courts to focus its attention on the substantive merits of the dispute rather than upon procedural niceties. *Markwell v. Whinery's Real Estate, Inc.*, 869 P.2d 840, 842 (Okla. 1994)). Under our liberalized pleading code, although double recovery may not be permissible, parties are allowed to set forth statements of claims alternatively or hypothetically and rely on inconsistent theories rather than to elect a single legal theory. *Howell v. James,* 818 P.2d 444, 447 (Okla. 1991)), *See*, 12 O.S.Supp. 1987 § 2008 (E)(2). Gay v. Hartford Underwriters Ins. Co., 904 P.2d 83, 86-87 (Okla. 1995); Hampton v. Hammons, 743 P.2d 1053, 1057 (Okla. 1987); Maule v. Indep. School Dist. No 9, 714 P.2d 198, 202 (Okla. 1985). *See also Beshara, supra,* (Under this standard, we need not consider any of the Bank's evidence that it was justified in placing a hold on Beshara's checking account or that it was justified in continuing to withhold his funds. That is precisely the question for the jury to answer after it considers all of the evidence presented by both parties)

We note that it appears that the Bank argues that Beshara should be precluded from asserting any errors relating to any of his alternative theories other than wrongful dishonor because he allegedly did not seek reconsideration of the trial court's order ...However, we find the Bank's argument is

without merit. The record reflects that Beshara continually attempted to assert his alternative theories of recovery and to present evidence relating to those theories both prior to and at the time of trial, but the trial court limited his cause of action to wrongful dishonor."

Demurrer to evidence sustained only when entire absence of proof The question of proximate cause is one of law for the trial court only if no evidence has been produced from which a jury could reasonably find a causal link between the negligent act and the injury or where the facts are undisputed. T*hompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260, 263 (Okla. 1982); Woodward v. Kinchen, 446 P.2d 375, 378 (Okla. 1968);

Otherwise, the proximate or contributing cause of a plaintiff's injury is a question of fact for the jury. *Thompson v. Presbyterian Hosp., Inc., see note 17,* supra; K*imery v. Public Service Co. of Oklahoma*, 622 P.2d 1066, 1070 (Okla. 1981); *Harbour-Longmire Bldg. Co. v. Carson* 201 580, 208 P.2d 173, see note 15, supra. "While the question of proximate cause of an injury is always for the jury, violation of the foregoing ordinance would constitute negligence per se. *See also,* R*iss and Co. v. Reed*, 301 P.2d 208, 210 (Okla. 1956) "where this Court states that the question of proximate cause is always for the jury to determine." *Gay v. Hartford*

Underwriters Ins. Co., 904 P.2d 83, 86-87 (Okla. 1995); "proximate cause is for the jury negligence per se" Accord, *Hampton v. Hammons*, 743 P.2d 1053, 1057 (Okla. 1987))

Dismissal of Claims

"In her summary of argument Ms. Knight also mentions the dismissal of her claim for intentional infliction of emotional distress, which the district court dismissed on the merits. But because her brief does not develop the issue beyond this cursory identification, we consider it waived. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.")." ..Apx18aNote4

The factual circumstances surrounding Scroggs' alleged wrongful conduct, part of which was claimed to be fraudulent, a fact-finder "could ... reasonably infer that emotional distress was a natural and probable consequence of Scroggs' [wrongful/fraudulent] action." Worsham v Nix, 83 P.3d,879, 888, ¶ 27 CIV APP 2 (OK 2004).

"Ms. Knight argues that the district court should have allowed her to pursue claims of negligence per se, usury, conversion, fraud, unjust enrichment, and violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (FDCPA).4 These claims fall into two categories: (1) claims that were asserted initially, but were dismissed with leave to amend and not reasserted (or at least not timely reasserted); and (2) claims that apparently never were asserted (or at

18343

least never asserted properly)." ...Apx18a

*"Ms. Knight's state complaint asserted claims for conversion and deceit. The district court dismissed this complaint in its entirety because it failed to show how Ms. Knight's damages were different from Phoenix's; but the court granted Ms. Knight leave to file an amended complaint. The court did not indicate that any particular claim was ineligible for repleading. Yet neither the amended complaint nor the second amended complaint reasserted claims for conversion or deceit."*Apx19a

"An amended complaint supersedes a prior complaint "and renders it of no legal effect." Davis v. TXO Prod. Corp., 929 F.2d 1515, 1517 (10th Cir. 1991)) (internal quotation marks omitted). When a claim has been dismissed on the merits, a party may file an amended complaint omitting that claim without waiving an appellate challenge to the dismissal. See id. at 1517-18. But the district court's order in this case did not "conclusively rule[]" on the conversion or deceit claims. Id. at 1518. The court simply noted that Ms. Knight had to plead individual damages if she wished to assert individual claims. All the claims in the original complaint were dismissed for the same reason; nothing in the district court's order suggested that the additional allegations needed to state one of the claims properly would not also cure the defect in the other claims. Hence, there was no compulsion from the court to abandon any particular claim. Yet rather than repleading the conversion and deceit claims, as allowed by the district court, Ms. Knight filed a second amended complaint that did not

include them. The omission resulted in abandoning these claims." Apx19-20a

"Finally, it does not appear that Ms. Knight ever properly tried to assert claims for negligence per se, usury, unjust enrichment, or violation of the FDCPA. None of these claims was included in the removed state complaint, the amended complaint, or the second amended complaint. Negligence per se and unjust enrichment were raised in the amended final pretrial report, but as we have just discussed, the district court ruled that the pretrial order could not revive or expand the claims at issue, and Ms. Knight does not appear to challenge the refusal to allow an eve-of-trial amendment. Thus, there was no reason for the district court to instruct the jury on those claims." Apx20-21a

The Appellate is clearly wrong in this statement. Conversion, unjust enrichment, usury ,(Apx 239a, 247a-Items 20,60-62)and violation of FDCPA (inferred) and negligence (Apx241-244a) were included in the second amended complaint Mention of a claim should be considered whether listed as a claim or a theory In fact, Mooring proffered limited arguments opposing at least some of these charges and attempted to influence the fees award based on defending all of claims. Damages from these claims are self supporting and not affected by the courts exclusionary decision discussed herein.[10] The

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[10] The calculation of the usurious charges was listed separately on the damage schedules. This was to facilitate

application of 100% of of the $150,000 paid on the note indisputably supports usury which in turn validates negligence per se. Res ipsa loquitur.

In fact, Respondents argued against this charge.

> Since the trial court sustained a demurrer to the petition, the petition must be liberally construed, and all of its allegations of fact must be taken as true, together with all reasonable inferences therefrom. "If any fact stated therein entitles plaintiff to any relief, the trial court erred in sustaining Bank's demurrer to the petition." *Wallace v. Williams*, Okl., 313 P.2d 784. We therefore hold the petition contains sufficient allegations of usury and the trial court erred in sustaining Bank's demurrer. *Hollamon v. First State Bank Of Stroud*, 389 P.2d 352,Ok (1963)
>
> In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., supra,* at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v.Sorema N.A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002);

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the penalty assessed by law, as well as to prevent any overlapping of charges, since the "excess expenses" did include the excess of interest paid to respondents over the amount to be paid on the new financing due to rate differences.

18343

> *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). *See Erickson,* supra. at 2200.
>
> The dimensions of a suit are not determined by the pleadings, Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970); and it is not necessary to allege the particular law or theory under which recovery is sought. United States v. Missouri-Kansas-Texas Ry. Co., 273 F.2d 474 (10th Cir. 1960).
>
> The Beshara court held: For simplicity, we refer to the action as one in conversion. Whether the Bank withheld Beshara's funds for a commercially reasonable length of time, whether it wilfully or intentionally dishonored the checks, or whether any damages were proximately caused by the dishonor is a question of fact for the jury. Consequently, the trial court erred in refusing to submit the wrongful dishonor claim to the jury.

As there, the court erred in not allowing Petitioner's claims to go to the jury. His failure to recall what his previously orders were demonstrates the confusion and misapplication of law that pervades this case. It is inconceivable how the appellate missed this error in application of well settled law unless no review was made.

The courts analysis of the pre-trial report

was erroneous.

"Ms. Knight did include conversion as a legal issue in the amended final pretrial report. The district court anticipated adopting the pretrial report as the pretrial order, and the inclusion of a claim in the pretrial order can supersede the pleadings, see Weyerhaeuser Co. v. Brantley, 510 F.3d 1256, 1267 (10th Cir. 2007)). For two reasons, however, we do not consider the pretrial report to have amended the pleadings in this case. First, the district court specifically ruled that it would not allow the pretrial report or order to revive or expand the claims at issue beyond the already asserted claims of breach of contract, bad faith breach of contract, and tortious interference. Second, Ms. Knight does not appear either to argue that the pretrial order actually amended the pleadings, or to explain why the district court should have allowed an eve-of-trial amendment to the pleadings.." Apx20a

The District Court noticed issues in the pre-trial order signifying - "maybe it's in there to preserve a position or something." Apx 59a

Furthermore, the April ruling was made before Petitioner was a party.

The District Court's ruling that it would not expand or revive claims since he had already ruled in April, 2007, was based on forgetfulness or misunderstanding of the claims. (Apx 59-60a)For instance, interest charges ruled on then was Petitioners' application of payments according to the previous owner's procedure. This had nothing to do

with the usurious charges made by Respondent by applying 100% of all payments to interest. That action by Respondent converted the payments to interest and unjustly enriched Respondent. Usury, conversion, unjust enrichment and negligence per se claims all relate to and are proven by that improper posting of payments.

Ms. Knight argues that the district court should have allowed her to proceed with claims of negligence, negligent nondisclosure, and negligent misrepresentation. The district court dismissed these claims on the ground that Oklahoma requires more than mere negligence to impose tort liability on a commercial lender. As discussed above, this appears to be a correct reading of Oklahoma law. See Rodgers, 756 P.2d at 1227; see also Beshara, 928 P.2d at 288; First Nat'l Bank & Trust Co. of Vinita, 859 P.2d at 509." .. Apx17-18a

This statement is simply wrong. The district court allowed Phoenix to assert tort liability at trial. In addition that ruling referred to was prior to vacating its previous decisions. Apx 62a

> As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover. *Wright & A. Miller, Federal Practice & Procedure* 1219 at 194 (1990)§ 1219 at 282-83 (2004)
>
> We recognize that most of our sister circuits have stated the general rule that a complaint need not set forth the plaintiff's legal theories

18343

8.04. *See James Wm. Moore et al., Moore's Federal Practice § Federal Practice and Procedure* § [3] n. 13 (3d ed.2008) (collecting cases); *Charles Alan Wright & Arthur R. Miller* 1215 n. 1 (3d ed.2004) (same).

We review de novo the district court's interpretation of a statute. United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999). *See also* Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F.3d 1213, 1216 (10th Cir.2008) (on appeal from summary judgment, evidence is viewed in light most favorable to appellant); Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 506 (8th Cir.1993) (on appeal from denial of requested instruction, "evidence must be examined in the light most favorable to the party proposing the instruction").

The court's refusal to allow those claims was clearly erroneous, arbitrary and an abuse of discretion, in opposition to clear unmixed question of law and against the interest of justice and in opposition to opinions of this Court, other circuits and its own.

Exclusion of Lay witnesses

"The subject matter of the proffered testimony was not what the witnesses had personally observed but opinion testimony regarding possible future occurrences." Apx22a

The district court made no suggestion of voir dire and had no reasonable basis to conclude their

testimony would be other than tasks performed or observed as was indicated on the witness list. Petitioner was not given any opportunity to testify, therefore the court could not make any reasonable decision as to the admissability of the testimony.

The courts failed to give consideration to Pro Se pleadings

> Pro Se parties have the right to Appeal, and submit their briefs on appeal even though they may be inartfully drawn", *Vega v. Johnson*, 149 F.3d 354 (5th Cir. 1998). Also, "Courts will go to particular pains to protect pro se litigants consequences of technical errors if injustice would otherwise result." (emphasis) *U. S. v. Sanchez*, 88 F.3d 1243 (D.C. Cir. 1996).
>
> Consistent with Supreme Court and Tenth Circuit precedent, the Court will construe pro se pleadings liberally when ruling on a motion for summary judgment. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir.2002); *Cf. Estelle v. Gamble*, 429 U.S. 97,106, (1976).
>
> Court errs if court dismisses pro se litigant without instructions of how pleadings are deficient and how to repair pleadings." *Plaskey v CIA*, 953 F .2nd 25. "The trial judge should inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish." (emphasis added) *Breck v. Ulmer*, 745 P.2d 66, 75 (1987).

18343

> Accused pleadings may not be summarily dismissed. This court is hereby put upon mandatory notice to observe the determinations of the Supreme Court of the United States, in the case Puckett v. Cox where it was held that a pro-se ... complaint requires a less stringent reading than one drafted by an attorney, said by Justice Black in *Coneley v. Gibson*,355 U.S. 41 at 48 (1957). *Hagins vs Levine* 415 US 533 note 3 (1974) SeeArthur v. Fry, 300 F. Supp. 622 (1960). Puckett v. Cox 456 F2d 233 (1972 Sixth Circuit USCA) see also Haines v. Kerner, 404 US 519-521 (1972).
>
> "... allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, id* 355 U.S. 41, 45-46 (1957). *See Dioguardi v. Durning,* 139 F.2d 774 (CA2 1944); Plaskey v. CIA, supra

This Court should determine whether the deference to the award of attorney fees requiring only narrative rationales without disclosing detailed calculations

18343

(which presumably would be utilized) provides an adequate method for review of the reasonableness of such awards.

The theory expressed for determination of the attorney fees award was not reliably applied thereby arriving at a clearly prejudicial and erroneous result, against reason, logic and facts, that was manifestly unjust .

"Both sides sought attorney fees. Capital and Financial requested a fee award of $306,644.34 against Ms. Knight (but not against Phoenix); and Phoenix requested an award of $224,392.17 against Capital and Financial. Without holding a hearing on the fee motions, the district court applied Okla. Stat. tit. 12, § 936 and granted both motions in part. It ordered Capital to pay Phoenix's fees in the amount of $49,000 and Ms. Knight to pay Capital's and Financial's fees in the amount of $88,000. Phoenix and Ms. Knight appeal both the judgments on the merits and the fee awards". Apx6a.

23 O.S.2001, § 21: Whether a party is entitled to a statutory attorney's fee is a legal question, and will be reviewed de novo by this Court. Kluver v. Weatherford Hosp. Auth., 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. Once the legal right to a fee is established...The standard of review then becomes whether the trial court made a clearly erroneous conclusion and judgment, against reason and evidence

and thus abused its discretion in granting the attorney's fee award. Broadwater v. Courtney, 39, ¶ 7, 809 P.2d 1310, 1312 (OK 1991)

This Court reviews any such award under an abuse of discretion standard. A trial court abuses its discretion when it applies an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W..3d 82, 85 (Tenn. 2001).

It is even more apparent in the fees award than in the merits award that the decision lacks logic, ignores facts presented, and contradicts items given judicial notice. In short, the mere making of the statements that certain items were noticed did not carry over into the calculation. In other words, the court's theory was not reasonably or reliably applied in the methodology. The conclusion is connected to the data only by the "ipse dixit" of the court and disproven by mere arithmetical calculations.

"In appealing the fee award of $88,000 to Capital and Financial, Ms. Knight argues that the district court erred in giving no weight to her pro se response; that the court erred in awarding fees to Capital and Financial based on her contract claim even though she was similarly situated to Phoenix, which was successful on its contract claim; that the award was excessive; and that Capital and Financial do not deserve an award of fees because of their bad faith and misconduct." Apx26a

"(To the extent that Ms. Knight also adopts

18343

arguments made by Phoenix, they fail for the reasons discussed above.)" Apx27a

The court listed those as: No hearing was required, and that the court properly applied the Burk factor including this statement:

"Phoenix's counsel spent some time on Phoenix's tort claims and Ms. Knight's counterclaims, which were unsuccessful" Apx27a

This contradicts the district court's statement when in Phoenix' fee award it acknowledges,

> "Recognizing this, Phoenix has made significant redactions, principally from the time otherwise charged by Mr. Watson and Mr. Brown, for time spent on Ms. Knight's claims. While certain adjustments to the time of others is arguably appropriate, the court concludes the indicated redactions reasonably approximate the time attributable to the Knight claims." Apx43a
>
> In addition the court states "Many of these [issues] are necessarily judgment calls for which a detailed factual or mechanical analysis is not proactical"
>
> This begs the question how then is the fee or the reasonableness of it determined? Certainly this decision must have involved some undisclosed mathematical computations.

"It appears that the first—and only—request for a hearing appeared in a pro se motion for

reconsideration filed by Ms. Knight. As stated above, as a nonattorney, Ms. Knight could not represent Phoenix in this litigation. See Tal v. Hogan, 453 F.3d 1244, 1254 & n.8 (10th Cir. 2006) (collecting cases)." Apx25a-Note 6

This statement makes no sense, Petitioner's request for a hearing on fees assessed against her should not be denied because Phoenix was the other party.

"But as with the Note argument, the parties have not argued on appeal that this claim is not among the fee-bearing claims listed in § 936. And they did not raise such an argument before the district court. Thus, any such argument also is waived" Apx24a-Note5.

Petitioner did argue that Respondents even stated they were not claiming under that statute, only under the contract, and they did not name Petitioner in the suit. Apx

"The district court declined to consider Ms. Knight's pro se response to Capital and Financial's attorney-fee motion. We acknowledge that three days before Ms. Knight filed her pro se response, she filed notice that she wished to proceed pro se. Still, the district court did not commit reversible error in giving no weight to the response. The response was not restricted to Ms. Knight's position, but purportedly also was submitted on behalf of Phoenix, an entity which Ms. Knight could not represent in court. In addition, it was somewhat duplicative of the response filed by counselApx27a

18343

The appellate statement usage "purportedly" indicates no review was made of the documents, therefore how can the court determine whether there was an abuse of discretion? It is obvious the appellate merely adopted the court's statement. 5 pages of litigation history of 24 pages hardly meets the allegation of representing Phoenix. (Apx 203a) To state that it was duplicative of counsel's further indicates the failure to read the pleadings but rather mere adoption of lower court's comments. Counsel's 5 page pleading did not even seem to realize that the fees award was assessed against only Petitioner, not to mention other inadequacies. Petitioner's request for reconsideration (Apx143a) ran to 30 pages also, and yielded a one-line order denying it. Apx 30a.

Further, it is error to suggest that the proceedings that created the fees has no bearing to the determination of the award. This is especially true due to the tortious progress of the case. The court, itself, included certain history in its analysis, even though the impact on the awards is less than clear. That inclusion is as much a re-arguing the case as was Petitioner's pleadings.

Neither was any apparent consideration given to Petitioner's appeal disputing this same characterization.

This also ignores that courts are not only obligated to accept pro se pleadings, but to allow more liberal review.

Petitioner also argued:

18343

She succeeded both in equity and receiving a monetary award evidenced by the reduction in the balance being claimed. She cited cases where no money damages were awarded yet party was deemed prevailing party.-

That she had no obligation to pay any fees for breach of contract since Phoenix was the only party claimed against.

That Respondents cannot recover for prevailing on Knight's tort claims, including the good faith and fair dealing, by law and since Mooring only preserved the right to recover for fees specified in the note and mortgage and further that Mooring is not entitled on the one remaining claim as discussed in Doc 353.

Based on the ratio to total fees, the award is not equitable even if chargeable to Petitioner and/or additionally has the effect of charging her with fees related to Phoenix that the Order clearly states are not chargeable to her.

The district court acknowledged Knights late entry, the failure to ask fees against Phoenix, that the contract does not provide a basis for fees tort claims, that counsel for Knight did not dispute the Section 936 was appropriate to claim under,

The courts failed to acknowledge that Knight disputed the award under 936 as well as the contract or that the contract limited recovery of fees.(See Apx 38a note12)

"On appeal Ms. Knight has not identified any

argument in her pro se response that would have changed the result."id

Statements like this leave one aghast. Obviously no statement changed the result. A better word would be "should" have and those statements are as they are and summarized here. Obviously a fee award that very likely exceeds 100% of allowable charges cannot be in the interest of justice.

"Ms. Knight also asserts that she prevailed in substance, and complains that Capital and Financial should not be able to recover fees on the contract claim because she and Phoenix (which was successful on its contract claim) were similarly situated. But legally she did not prevail, and she and Phoenix were not similarly situated. Damages are an essential element of a claim for breach of contract. See Digital Design Group, Inc. v. Info. Builders, Inc., 24 P.3d 834, 843 (Okla. 2001). Phoenix had evidence of damages and proved a portion of its claimed damages to the jury's satisfaction. In contrast, as discussed in No. 09-6075, Ms. Knight did not have any admissible evidence of individual damages. Thus, Phoenix was successful with its claim, whereas judgment was entered in favor of Capital and Financial on her claim." Apx27-28a

Petitioner's argument was any ruling should have reached the same indisputable conclusion, that Capital breached the contract as against both signing parties. The court's answer was after the ruling that denied any damages, the conclusions were different. See also court's confusion at Note 3 Apx 17a.

18343

No weight was given to the fact of achieving the result desired, reduction to the true balance.

"Ms. Knight also argues that the amount of the award was excessive because the district court gave too much weight to Capital and Financial's evidence, did not properly weigh that Capital and Financial created the situation that led to increased fees, failed to consider that Ms. Knight did not enter the case until January 2008, and failed to consider that Capital and Financial would have borne the same expenses if Phoenix had been the only party. We see no abuse of discretion in the court's award. The court noted that both sides bore some responsibility for "a small to medium sized problem blossoming out of control." No. 09-6141, Aplt. App. Vol. II at 472. Apx28a

The appellate's reference to "blossoming" ruling derived from the order vacating rulings before Petitioner was a party.

The court recognized that Capital and Financial improperly sought fees for time periods before Ms. Knight became a party. It thoughtfully reviewed the case, taking into account "the time spent on Ms. Knight's claims versus those involving Phoenix, the apportionment necessary to reflect time attributable to only the contract-based claim asserted by Ms. Knight against Mooring, and all surrounding circumstances" in arriving at its fee award. Id. at 476. Although Ms. Knight claims the district court erroneously believed that she and Phoenix "persistently" refused "to ever offer their suggestion

18343

as to what the appropriate payoff balance was," id. at 475, we will not reweigh the evidence. There is record support for the district court's view." Apx28a

This is a distorted presentation since it re-iterates only a partial statement . See Apx 165a Item 1. Since this presumption by the court seems to have had a material effect on the award, a question of law is thus presented which calls for a consideration of the record, not for the purpose of weighing the evidence, but for the purpose of determining whether there was some evidence.

Although the district court stated

"Approximately half of the fees sought by Mooring relate to time spent before she became a party. ....Mooring.... seeks fees against Ms. Knight for periods when she was not even a party in the case." Apx 41note 18), analysis does not indicate this was actually taken into effect in the award.

The mere making of the statements that certain items were noticed did not carry over into the calculation. In other words, the court's theory was not reasonably or reliably applied in the methodology.

There is no reasonable support for the district court's view. The final calculation of the award is connected to the facts only by it's own "ipse dixit"

As noted above, "time attributable to only the contract based claim", was assessed at $88,000, though acknowledged by Respondent as not being claimed under Sec 936, and without suing her under the contract. Contrary to appellate's statement,

Petitioner disputed the award for those reasons.

The award, as was argued by Petitioner, amounted to 94% of total amounts billed and more than 134% of court rejected proposed lodestar after deduction for time charged before Petitioner entered the case and after she was excluded, which the court did not do, and by equally splitting the remaining charges after her entry despite the fact defensive arguments would be the same if she were not a party In comparison, the fees award to Phoenix was set at less than 20% of acceptable lodestar, also on only the contract based claim. Apx 176a.

Even this simplified computation demonstrates the inconsistency and in justice of the award. The court's "thoughtful review" failed to reveal pertinent facts, such as what percent was used to reduce Respondent's billings to lodestar since their suggested 30% was deemed inadequate. *See* Apx 176 note 11 for further unmade or unexplained adjustments. Apx 40a

The district court gave no judicial notice that Petitioners achieved the result desired of reducing the balance to a true amount and declaratory judgment was provided but not acknowledged.

"Finally, Ms. Knight contends that Capital and Financial are not entitled to an award of attorney fees because of their bad faith. "To strictly apply the American Rule in this case would be to do a great 'injustice to Knight and reward Mooring for its oppressive acts." Knight Aplt. Br. at 29. But the district court declined to find that Capital and Financial acted in bad faith. Further, the district

court assessed blame for the protracted litigation on all parties, not just Capital and Financial. These determinations exhibit no abuse of discretion." *Apx29a*

It is believed the court made no ruling regarding bad faith, just merely ignored the issue, concluding that fees were not allowed as compensatory damages.

CONCLUSION

The petition for a writ of certiorari should be granted for each or all of the reasons stated above to send a message and clarify other matters.

Or in the alternative the case should be reversed and remanded.

Respectfully submitted,

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Dated December 20, 2010

Supreme Court, U.S.
FILED

101002 DEC 20 2010

OFFICE OF THE CLERK

No. 10-

IN THE
Supreme Court of the United States

JUDY KNIGHT

Petitioner,

V.

MOORING CAPITAL FUND, LLC; and
MOORING FINANCIAL CORPORATION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX
FOR PETITIONER JUDY KNIGHT

Volume I

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APPENDIX A --- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JULY 22, 2010
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case Nos. 09-6075 & 09-6141

MOORING CAPITAL FUND, L.L.C & MOORING FINANCIAL CORPORATION,

Plaintiff,-Counter-Defendant-Defendant-Appellees

v.

JUDY KNIGHT, PLAINTIFF, PHOENIX CENTRAL, INC., an Oklahoma corporation,

Defendant-Counter-Claimant-Appellants

ORDER AND JUDGMENT

Before HARTZ, MCKAY, and ANDERSON, Circuit Judges.

The commencement of a foreclosure action by Mooring Capital Fund, LLC (Capital) against borrower Phoenix Central Inc. (Phoenix) prompted Phoenix to bring tort and contract counterclaims against Capital. In addition, Phoenix's president and sole shareholder, Judy Knight, pursued similar claims in her individual capacity against both Capital and its servicing agent, Mooring Financial Corporation (Financial). The foreclosure action settled, leaving only Phoenix's

counterclaims and Ms. Knight's claims.

At the close of evidence at trial, the district court granted judgment as a matter of law to Capital and Financial on Ms. Knight's claims because she was unable to show that she individually had suffered any damages that were separate from Phoenix's alleged damages. As for Phoenix's counterclaims, the jury found for Phoenix on one counterclaim and for Capital and Financial on the others. The district court then granted in part both parties' motions for attorney fees, ordering Capital to pay fees to Phoenix and ordering Ms. Knight to pay fees to Capital and Financial. In appeal No. 09-6075, Phoenix (through counsel) appeals the jury verdict and Ms. Knight (proceeding pro se) appeals the grant of judgment as a matter of law. In appeal No. 09-6141, Phoenix appeals the fee award of $49,000 (much less than the $224,392.17 it had requested) and Ms. Knight appeals the fee award against her.

Exercising jurisdiction under 28 U.S.C. § 1291, we hold that the district court did not err in its pretrial and trial rulings, and therefore we affirm the judgments underlying appeal No. 09-6075. We also affirm both attorney-fee awards in appeal No. 09-6141.

I. BACKGROUND

In 1992 Phoenix and Ms. Knight executed a promissory note secured by a mortgage on a shopping center owned by Phoenix (the Shopping Center). In 1993 that note was replaced by an amended note (the Note), and eventually the holder of the Note

transferred it to Capital. In 2004 Ms. Knight and Phoenix planned to refinance the Shopping Center and use the proceeds of the refinancing to repair and sell one or more vacant rental houses and to develop a separate 40-acre parcel of land (the 40-Acre Parcel) into a residential subdivision. To accomplish the refinancing, they needed to pay off the Note; but Capital could not or would not provide an accurate payoff amount.

After Phoenix and Ms. Knight stopped making payments on the Note in February 2005, Capital initiated a state-court action against Phoenix to recover on the Note and to foreclose on the Shopping Center. Citing diversity jurisdiction, Phoenix removed the action to federal court. Phoenix also brought several counterclaims seeking damages for not being able to accomplish the refinancing and therefore not being able to develop the 40-Acre Parcel. In its third amended answer and counterclaim Phoenix alleged that Capital breached the Note's implied covenant of good faith and fair dealing and was liable for negligence, tortious interference with prospective business relations, and tortious breach of contract. The district court granted partial summary judgment in favor of Capital with respect to liability (but not damages) on its claims. Initially, it also granted Capital summary judgment on all of Phoenix's counterclaims, except the counterclaim for breach of the implied covenant of good faith and fair dealing; but in March 2008 the court vacated that order because Capital had turned over additional discovery containing facts favorable to Phoenix.

Appendix A---

In the meantime, Ms. Knight and another of her companies, Mini Malls of America, filed a separate state-court action against Capital and Financial. Capital and Financial removed the action to federal court, and the court consolidated that action with the foreclosure proceeding. The district court dismissed the state-complaint claims because Ms. Knight and Mini Malls had not "state[d] a basis for recovery separate and apart from whatever harm Phoenix may have suffered," but allowed them leave to amend. No. 09-6075, Aplt. App. Vol. II at 437. They filed an amended complaint, which the court dismissed. The court held that Mini Malls had shown only an attenuated relationship with Capital that was insufficient to create any legal duty owed by Capital. The court also held that Ms. Knight, as a party to the Note, may have claims against Capital that paralleled Phoenix's counterclaims, but the allegations in the amended complaint did not adequately plead tort liability under applicable Oklahoma law. The court allowed Ms. Knight leave to amend her complaint once again to set forth claims paralleling Phoenix's claims. Ms. Knight's second amended complaint set forth claims of breach of the implied covenant of good faith and fair dealing, negligence, tortious breach of contract, and tortious interference with present and prospective business relations. The court allowed these claims to proceed.

In November 2008 Phoenix and Ms. Knight satisfied the Note, so the foreclosure action was dismissed. Before trial on Phoenix's counterclaims and Ms. Knight's claims, the district court made several

evidentiary rulings relevant to this appeal No. 09-6075. First, the district court limited the testimony of Phoenix's expert economist, Dr. James Horrell, under the principles expressed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999). Second, the court barred Ms. Knight from testifying about lost profits from the failure to develop the 40-Acre Parcel and the rental houses. Third, the court indicated that it would be inclined to prohibit lay witnesses from giving opinion testimony about "expert" matters such as projecting development costs or the process of platting a subdivision, although they could testify to historical facts concerning the 40-Acre Parcel. Fourth, the court excluded from evidence a 2004 appraisal of the Shopping Center prepared for another lender. Fifth, the court prohibited introduction of any evidence of damages to Mini Malls. Finally, the court held that Phoenix and Ms. Knight could not claim as damages the bulk of the attorney fees that they had incurred during the dispute.

At the jury-instruction conference, Ms. Knight's counsel stated that in light of the district court's evidentiary rulings concerning the 40-Acre Parcel and the rental houses, Ms. Knight had to concede that she would not be able to establish her own individual damages, as distinguished from Phoenix's corporate damages. Accordingly, the district court granted judgment as a matter of law to Capital and Financial on her claims, leaving only Phoenix's counterclaims for the jury. The court instructed the jury on breach of the implied covenant of good faith and fair dealing,

tortious breach of contract based on gross recklessness/wanton negligence, tortious interference with business relationships, and tortious interference with prospective economic advantage. It rejected, however, Phoenix's request to instruct the jury on a claim of gross negligence. The jury found in favor of Phoenix on its contract counterclaim and in favor of Capital on the three tort counterclaims; and it awarded $8,980 in damages to Phoenix.

Both sides sought attorney fees. Capital and Financial requested a fee award of $306,644.34 against Ms. Knight (but not against Phoenix); and Phoenix requested an award of $224,392.17 against Capital and Financial. Without holding a hearing on the fee motions, the district court applied Okla. Stat. tit. 12, § 936 and granted both motions in part. It ordered Capital to pay Phoenix's fees in the amount of $49,000 and Ms. Knight to pay Capital's and Financial's fees in the amount of $88,000. Phoenix and Ms. Knight appeal both the judgments on the merits and the fee awards.

II. ANALYSIS

A. Appeal No. 09-6075

This appeal concerns the merits dispositions of Phoenix's counterclaims and Ms. Knight's claims.

1. Phoenix's Arguments

Phoenix primarily takes issue with the district court's evidentiary rulings, but it also contends that the district court should have instructed the jury on gross negligence.

Appendix A---

a. Exclusion of Evidence Regarding 40-Acre Parcel

Several of Phoenix's arguments concern the district court's exclusion of evidence regarding the 40-Acre Parcel. Phoenix contests the exclusion of Dr. Horrell's testimony on the financial consequences of the failure to develop the parcel; the exclusion of other testimony on the damages from the failure to develop the parcel; and the exclusion of certain opinion testimony from lay witnesses regarding the development of the parcel.

The court provided two reasons for excluding evidence of damages from failure to develop the 40-Acre Parcel and the rental houses. To begin with, it said (a) that such damages could not be recovered under the contract claim because there was no evidence that such damages were within the contemplation of the parties at the time the Note was made and (b) that such damages could not be recovered under the tort claims because there was no evidence that they were foreseeable at the time of the alleged torts. Second, it said that there was no admissible evidence of any lost profits from the parcel and the rental houses because (1) the parties could not call lay witnesses to testify about expert topics such as the platting process and development costs, and (2) Ms. Knight had not been named as an expert witness and she did not have the business experience to testify about the development process.

Phoenix disputes the court's evaluation of Ms. Knight's qualifications to testify about the 40-Acre Parcel. Its opening brief, however, fails to address the

court's other reason for excluding her damages testimony—that the damages she sought to recover were not within the parties' contemplation at the time of contracting or foreseeable at the time of the alleged torts. Arguments not raised in the opening brief are waived. See City of Colo. Springs v. Solis, 589 F.3d 1121, 1135 n.5 (10th Cir. 2009). Phoenix, then, has waived any challenge to the court's first rationale for barring Ms. Knight's testimony about the 40-Acre Parcel. For the same reason, we will not reverse the district court's decisions to bar other testimony (by Dr. Horrell and the lay witnesses) concerning the 40-Acre Parcel and the rental houses.

b. Exclusion of Dr. Horrell's Shopping Center Testimony

Phoenix designated Dr. Horrell to testify not only about the 40-Acre Parcel but also about excess expenses that Phoenix had incurred and the lost rental income from the Shopping Center due to the inability to refinance. But the district court limited his testimony on these other matters to mathematical calculations.

With regard to the Shopping Center, the court noted that Dr. Horrell relied on the 2004 appraisal of the Shopping Center in proposing to testify "that the shopping center would have generated net revenues equal to that projected in the 2004 appraisal." No. 09-6075, Aplt. App. Vol. I at 166. Although the court acknowledged that an expert could rely on the opinions of another expert, it stated that "Dr. Horrell's

references to the 2004 report do not suggest that he made any systematic effort to evaluate the methods employed in the appraisal or to evaluate its applicability to the present circumstances." Id. at 169. "There is no indication that he has any particular background in real estate leasing operations or that he undertook any investigation to independently determine what the leasing activity for a shopping center of this sort in this location would have generated." Id. at 170. Accordingly, the court held that "any opinion testimony as to what lease revenues from the shopping center would have been in various circumstances, or as to the reasonableness of the 2004 report's assumptions, must be excluded." Id.

As for the alleged excess expenses, the court noted that "the listing of 'excess expenses' incurred by defendants is based entirely on information defendants provided to Dr. Horrell." Id. at 164. The court was concerned that Dr. Horrell would testify "that defendants' estimates of future real estate sales activity or of 'excess' expenses or the like are reasonable." Id. at 166. "It is clear," said the court, "that Dr. Horrell has neither undertaken any systematic investigation or independent analysis of the reasonableness of what defendants claim as their excess expenses nor has a basis for assessing the reasonableness of defendants' projections . . . ." Id. at 171 (footnote omitted). The court concluded: "His relatively limited efforts at verifying whether Ms. Knight has some document or basis for the estimates she makes fall far short of providing a basis for [him] to opine that the estimates or projections are

reasonable. He therefore cannot take Ms. Knight's estimates and present them in such a way as to make them sound like they are his." Id.

Phoenix contends that Dr. Horrell was qualified to offer the opinions that he submitted; that he was entitled to make assumptions, provided those assumptions could be proved at trial; and that he had tested his information against the actual facts as they became known. Because Phoenix does not claim that "the district court failed to employ the proper legal framework required by Daubert, we consider only whether the district court abused its discretion in actually applying this framework to the testimony at hand." United States v. Rodriguez-Felix, 450 F.3d 1117, 1125 (10th Cir. 2006). "We will not . . . disturb a district court's ruling absent our conviction that it is arbitrary, capricious, whimsical, manifestly unreasonable, or clearly erroneous." *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2004).

The district court did not abuse its discretion in limiting Dr. Horrell's testimony. Fed. R. Evid. 702 requires an expert's testimony to be "based upon sufficient facts or data" and to be "the product of reliable principles and methods" which have been "applied . . . reliably to the facts of the case." "Under *Daubert*, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) (ellipsis and internal quotation marks omitted).

"[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The district court offered cogent rationales supported by the record for limiting Dr. Horrell to presenting numerical calculations regarding damages. Dr. Horrell's years of experience and other qualifications do not overcome the district court's concern about lack of independent investigation in this case. See *United States v. Nacchio*, 555 F.3d 1234, 1258 (10th Cir.) (en banc), cert. denied, 130 S. Ct. 54 (2009) ("Although [the expert] generally has been permitted to testify in the past, and a district court might well respect his credentials, the court had an obligation to assess the methodology that [the expert] had employed in the case at hand."). Regarding the appraisal, Dr. Horrell admitted in his deposition that he had not examined the validity of the appraiser's assumptions. An expert is not entitled to testify to opinions that rely on the opinion of another expert, simply because the other is an expert. See TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 732 (10th Cir 1993) (expert who adopted the projections of another expert did not reasonably rely on those projections when "he knew little or nothing at all about" the other expert and the record did not reveal what efforts the expert independently made to corroborate the projections). And as to the calculations of expenses, the district

court did not abuse its discretion in disallowing testimony that would simply adopt and confirm what Ms. Knight had said. Cf. *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1080 n.4 (10th Cir. 2006) (it was not "'manifestly unreasonable' for the district court to conclude that [the expert's] opinions lacked foundation because they were based on 'the self-serving statement[s] of an interested party'").

Exclusion of Ms. Knight's Testimony About Shopping-Center Appraisal

The district court barred Ms. Knight from testifying about the 2004 appraisal. First, the district court believed that Ms. Knight's testimony would be essentially about someone else's expert opinion rather than testimony based on her own experience. Second, the district court indicated that the appraisal would be hearsay that did not fall under the business-record exception of Fed. R. Evid. 803(6).

In its opening brief Phoenix argues that the appraisal qualified as a business record, but does not address the district court's first ground for barring the appraisal report. Thus, as with its other challenge to limitations on Ms. Knight's testimony, it has waived any argument regarding that first ground, so we need not address its arguments with regard to the second.

Exclusion of Attorney Fees as Consequential Damages

Phoenix challenges the district court's ruling that it

could not claim as damages the bulk of its attorney fees. Relying on Phillips v. Snug Harbor Water and Gas Co., 596 P.2d 1273, 1276 (Okla. App. 1979), the district court held that Oklahoma law allows recovery of prelitigation attorney fees, but that fees incurred during the litigation were properly considered items of costs rather than damages. Phoenix argues that it is entitled to recover as damages all the attorney fees incurred in attempting to resolve the issue of a correct payoff balance, which was not determined until August 2007, well after the lawsuit was underway.

In a diversity case, we apply the substantive law of the forum state, in this case Oklahoma. See *Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 877 (10th Cir. 2005). We review the district court's interpretation of Oklahoma law de novo. See id.

Phoenix finds some support in *Phillips*. In that opinion the Oklahoma Court of Appeals held that a plaintiff's damages included lost time and expense caused by the defendant's actions, 596 P.2d at 1276; and among the expenses supporting the award, the court included the hiring of an attorney "to invoke the aid of the corporation commission." Id. But *Phillips* notwithstanding, "[t]here appears to be no all-encompassing Oklahoma rule that attorney fees are or are not 'compensatory damages.'" *Employers Reins. Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 767 (10th Cir. 2004). For example, the Oklahoma Court of Appeals wrote after Phillips, "Damages at common law have never included interest, fees and costs. Moreover, there was no right to attorney's fees at

common law, so any award thereof must be of statutory origin." *Allison v. City of El Reno*, 894 P.2d 1133, 1137 (Okla. App. 1994). And in *Barnes v. Oklahoma Farm Bureau Mutual Insurance Co.*, 11 P.3d 162, 181 (Okla. 2000), the state's highest court provided the following list of situations in which attorney fees may be awarded, absent a statutory or contractual provision, as an item of damages in a contract or tort suit: (1) when an attorney sues the client to recover fees, (2) when an insurer wrongfully refused to defend a prior lawsuit, or (3) when the defendant's actions "involved the plaintiff in litigation with others, or have placed him in such relation with others as to make it necessary for him to incur attorney fees to protect his interests." This list does not include the circumstances of this case. Therefore, we conclude that the district court did not err in barring Phoenix from seeking, as an element of damages, an award of the attorney fees it incurred during the litigation.[1]

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[1] Phoenix also assets that Capital acted in bad faith during the litigation, prolonging the suit and causing Phoenix to incur useless fees We do not consider this contention because 1 Phoenix has failed to supply any record cites to show where it made such an argument in the district court in connection with the damages issues See Fed R. App. P.28(a)(9)(A); 10th Cir R. 28.2(C)(2). "Arguments inadequately briefed in the opening brief are waived," *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998), and arguments not raised before the district court are waived on appeal, see *Rosewood Servs , Inc. v. Sunflower*

Appendix A---

Jury Instruction on Gross Negligence Based on Reckless Disregard

The district court instructed the jury on tortious breach of contract based on "gross recklessness or wanton negligence." No. 09-6075, Aplt. App. Vol. I at 46. Phoenix contends that the jury also should have been allowed to impose liability under what it terms the lesser "reckless disregard" standard. We review the refusal to give a jury instruction for abuse of discretion, see *Telecor Commun., Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1141 (10th Cir. 2002); but our review is de novo to the extent that we must interpret the substantive law of Oklahoma, see *Hjelle*, 394 F.3d at 877.[2]

Diversified Servs., Inc, 413 F.3d 1163, 1167 (10th Cir 2005).

[2] The record is not clear whether Phoenix preserved this issue. Although Phoenix requested a gross-negligence instruction, it also seemed to accede to the court's desire to simplify the tort theories. *Compare* No 09-6075, Aplt. App Vol. III at 651-54 (arguing for a gross-negligence instruction), with id. At 654 ("So in terms of the simplicity of the instructions, if that's what the Court's leaning is to simplify the tort theories into one, I would not have any basic disagreement with that approach.") But because ultimately Phoenix rested on desire for the instructions, see id. At 654 (indicating a possible miscommunication of counsel's position) id. at 663 (reiterating need for gross-negligence argument), and because we reject Phoenix's

In the commercial-lending context, Oklahoma does not recognize a tort claim for any conduct less culpable than gross recklessness or wanton negligence.

In *Rodgers v. Tecumseh Bank*, 756 P.2d 1223, 1227 (Okla. 1988), the court said: "To impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions. This is not to say that under every fact situation arising from a breach of contract that recovery may never lie. Gross recklessness or wanton negligence on behalf of a party to a contract may call for an application of the theory of tortious breach of contract." See *Beshara v. S. Nat'l Bank*, 928 P.2d 280, 288 (Okla. 1996) (recognizing the Rodgers standard and allowing plaintiff to proceed with allegations that the bank's action in withholding his funds were "intentional, malicious, and in reckless and wanton disregard"); *First Nat'l Bank & Trust Co. of Vinita v. Kissee*, 859 P.2d 502, 509 (Okla. 1993) (reaffirming Rodgers). It is not clear to us how "reckless disregard" differs from "gross recklessness." But whatever the difference, if any, we see no abuse of discretion in the district court's adoption of the gross-recklessness-or-wanton negligence formulation expressed in the leading Oklahoma Supreme Court decision on the matter. We affirm the denial of an additional instruction on reckless disregard.

2. Ms. Knight's Arguments

Ms. Knight, proceeding pro se, has filed a separate

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position even under the more favorable standard of review, we need not resolve whether the issue was preserved.

brief. We decline to consider her arguments regarding Phoenix's issues, because she is not a lawyer and thus cannot represent Phoenix in court. See *Tal v. Hogan*, 453 F.3d 1244, 1254 & n.8 (10th Cir. 2006) (collecting cases). For that reason, as well as Mini Malls' failure to appeal, we also decline to consider her argument that the district court erred in dismissing Mini Malls' claims. Further, to the extent that she adopts Phoenix's arguments regarding the limitations on testimony by Dr. Horrell and herself, the discussion above applies equally here. We now proceed to analyze her remaining issues.[3]

Negligence Claims

Ms. Knight argues that the district court should have allowed her to proceed with claims of negligence, negligent nondisclosure, and negligent misrepresentation. The district court dismissed these claims on the ground that Oklahoma requires more than mere negligence to impose tort liability on a commercial lender. As discussed above, this appears to

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[3] Ms Knight's opening brief argues that the district court erred in granting summary judgment to Capital and Financial. We cannot determine the purpose of the argument. The district court later vacated that summary judgment and let the claims proceed to trial, and the court's reasoning in initially granting the summary judgment was irrelevant to its disposition of Ms. Knight's own claims

be a correct reading of Oklahoma law. See *Rodgers*, 756 P.2d at 1227; see also *Beshara*, 928 P.2d at 288; *First Nat'l Bank & Trust Co. of Vinita*, 859 P.2d at 509. 4 In her summary of argument Ms. Knight also mentions the dismissal of her claim for intentional infliction of emotional distress, which the district court dismissed on the merits. But because her brief does not develop the issue beyond this cursory identification, we consider it waived. See *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.").

Dismissal of Other Claims

Ms. Knight argues that the district court should have allowed her to pursue claims of negligence per se, usury, conversion, fraud, unjust enrichment, and violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (FDCPA).[4] These claims fall into two categories: (1) claims that were asserted initially, but were dismissed with leave to amend and not reasserted (or at least not timely reasserted); and (2) claims that apparently never were asserted (or at least never asserted properly).

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[4] In her summary of argument Petitioner also mentions the dismissal of her claim for intentional infliction of emotional distress, which the district court dismissed on the merits But because her brief does not develop the issue beyond this cursory identification, we consider it waived See *Adler v Wal-Mart Stores, Inc.*, 144 F3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.").

Appendix A---

Claims that were asserted, but dismissed and not reasserted. Ms. Knight's state complaint asserted claims for conversion and deceit. The district court dismissed this complaint in its entirety because it failed to show how Ms. Knight's damages were different from Phoenix's; but the court granted Ms. Knight leave to file an amended complaint. The court did not indicate that any particular claim was ineligible for repleading. Yet neither the amended complaint nor the second amended complaint reasserted claims for conversion or deceit.

An amended complaint supersedes a prior complaint "and renders it of no legal effect." *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991) (internal quotation marks omitted). When a claim has been dismissed on the merits, a party may file an amended complaint omitting that claim without waiving an appellate challenge to the dismissal. See id. at 1517-18. But the district court's order in this case did not "conclusively rule[]" on the conversion or deceit claims. Id. at 1518. The court simply noted that Ms. Knight had to plead individual damages if she wished to assert individual claims. All the claims in the original complaint were dismissed for the same reason; nothing in the district court's order suggested that the additional allegations needed to state one of the claims properly would not also cure the defect in the other claims. Hence, there was no compulsion from the court to abandon any particular claim. Yet rather than repleading the conversion and deceit claims, as allowed by the district court, Ms. Knight filed a second amended complaint that did not include

them.The omission resulted in abandoning these claims.

Ms. Knight did include conversion as a legal issue in the amended final pretrial report. The district court anticipated adopting the pretrial report as the pretrial order, and the inclusion of a claim in the pretrial order can supersede the pleadings, see *Weyerhaeuser Co. v. Brantley,* 510 F.3d 1256, 1267 (10th Cir. 2007). For two reasons, however, we do not consider the pretrial report to have amended the pleadings in this case. First, the district court specifically ruled that it would not allow the pretrial report or order to revive or expand the claims at issue beyond the already asserted claims of breach of contract, bad faith breach of contract, and tortious interference. Second, Ms. Knight does not appear either to argue that the pretrial order actually amended the pleadings, or to explain why the district court should have allowed an eve-of-trial amendment to the pleadings.

Claims that never were asserted. Finally, it does not appear that Ms. Knight ever properly tried to assert claims for negligence per se, usury, unjust enrichment, or violation of the FDCPA. None of these claims was included in the removed state complaint, the amended complaint, or the second amended complaint. Negligence per se and unjust enrichment were raised in the amended final pretrial report, but as we have just discussed, the district court ruled that the pretrial order could not revive or expand the claims at issue, and Ms. Knight does not appear to challenge the refusal to allow an eve-of-trial amendment. Thus,

there was no reason for the district court to instruct the jury on those claims.

Individual Damages

Ms. Knight argues that the district court erred in barring evidence of her individual damages—namely, lost profits from the inability to sell the rental houses and the failure to develop the 40-Acre Parcel. The evidence excluded was lay-witness opinion testimony regarding such matters as the platting and subdivision process for the 40-Acre development and Ms. Knight's own opinion testimony about damages suffered from the delay in the development caused by Capital and Financial. As with expert testimony, the exclusion of lay-witness testimony is reviewed for abuse of discretion. *See Zokari v. Gates*, 561 F.3d 1076, 1088 (10th Cir. 2009).

The district court did not abuse its discretion in excluding this evidence. The subject matter of the proffered testimony was not what the witnesses had personally observed but opinion testimony regarding possible future occurrences. The court reasonably decided that such opinions could be provided only by qualified experts. Yet the witnesses had not been listed as expert witnesses. As for Ms. Knight, it is true that business owners may be qualified to testify about lost profits when (1) "the owners had sufficient personal knowledge of their respective businesses and of the factors on which they relied to estimate lost profits" or (2) "the owners offered valuations based on straightforward, common sense calculations." *LifeWise*

Master Funding v. Telebank, 374 F.3d 917, 929-30 (10th Cir. 2004) (collecting cases). But as the district court noted, Ms. Knight had no experience in land development and had never conducted a business with respect to the vacant houses. Notwithstanding the research that she had conducted to prepare for the development, the court could rationally decide that she did not have sufficient knowledge of these businesses to qualify for the business-owner exception. *Cf. Malloy v. Monahan*, 73 F.3d 1012, 1016-17 (10th Cir. 1996) (allowing business owner's testimony when he had "substantial experience in the purchase, rehabilitation, and sale of distressed properties").And her plans and projections went beyond straightforward common-sense calculations.

Because of the exclusion of this evidence, the district court properly dismissed Ms. Knight's claims. One necessary element of each claim was lost profits. We recognize that "[t]he general rule under Oklahoma law allows for the recovery of anticipated lost profits if the loss is capable of reasonably accurate measurement or estimate." *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 537 F.3d 1165, 1178 (10th Cir. 2008) (emphasis and internal quotation marks omitted). But the district court did not abuse its discretion in holding that, on the admissible evidence before it, any lost profits from the sale of the rental houses and the development of the 40-Acre Parcel were not capable of reasonably accurate measurement or estimate.

For these reasons, we affirm the judgment

underlying appeal No. 09-6075.

B. Appeal No. 09-6141

This appeal concerns the district court's orders that Capital pay Phoenix $49,000 in attorney fees, and that Ms. Knight pay Capital and Financial $88,000 in attorney fees. "In diversity cases, attorney fees are a substantive matter controlled by state law." *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 1001 (10th Cir. 2008). "Oklahoma strictly adheres to the American rule concerning attorney's fees," which generally requires that fees be authorized by a statute or a contract. Id. (internal quotation marks omitted); see Barnes, 11 P.3d at 178-79.The parties and the district court relied on Okla. Stat. tit. 12, § 936 to support both awards.[5] "We review the legal principles

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[5] Before the district court, Capital and Financial sought fees under both § 936 and the terms of the Note. The district court awarded fees only under § 936, however, and Capital and Financial do not renew on appeal their argument that the Note entitled them to a fee award against Ms Knight Thus, this argument is waived *See City of Colo. Springs v. Solis*, 589 F.3d 1121, 1135 n 5 (10th Cir 2009) (arguments not made in the opening brief are waived).

It is not clear that Oklahoma would hold that a claim for breach of the implied covenant of good faith and fair dealing is a claim encompassed by § 936 *See, e.g., Specialty Beverages*, 537 F 3d at 1184 ("[W]e have previously decided that the Oklahoma Supreme Court narrowly interprets all

underlying an award de novo," but the reasonableness and amount of a fee award for abuse of discretion. *Combs*, 551 F.3d at 1001.

1. Award to Phoenix

Phoenix appeals the fee award of only $49,000 on its claim for an award of $224,392.17 in attorney fees. It argues that the district court erred in not holding a hearing on its fee motion, by misapplying Oklahoma law regarding the calculation of fee awards, and by failing to make factual findings conforming to the evidence.

Phoenix argues that Oklahoma requires an evidentiary hearing before awarding attorney fees. We are not persuaded. Although the general practice may

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provisions of § 936 "), *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 164 P 3d 1063, 1069 (Okla 2007) ("Section 936 applies to a party who is successful on a contract claim *as specified therein* . . ." (emphasis added)), *Borst v. Bright Mort. Co.*, 824 P.2d 1102, 1104 (Okla 1991) (§ 936 does not apply when the prevailing party sought to cancel a note, not to collect on it). But as with the Note argument, the parties have not argued on appeal that this claim is not among the fee-bearing claims listed in § 936 And they did not raise such an argument before the district court Thus, any such argument also is waived *See City of Colo. Springs*, 589 F.3d at 1135 n.5, *Rosewood Servs , Inc. v. Sunflower Diversified Servs., Inc.*, 413 F 3d 1163, 1167 (10th Cir. 2005) (arguments not raised before the district court are waived on appeal)

be to hold a hearing, a federal district court is not always required to hold a hearing to establish an adequate record on a fee request under Oklahoma law. *See Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 773-74 (10th Cir. 1999). We review the decision not to hold a hearing for abuse of discretion. See *Robinson v. City of Edmond*, 160 F.3d 1275, 1286 (10th Cir. 1998). As in Robinson—also an appeal arising from a federal district court in Oklahoma—Phoenix has "been unable to point to any indication in the record that [it] requested a hearing." Id. "Ordinarily, a district court does not abuse its discretion in deciding not to hold an evidentiary hearing when no such request is ever made." Id.[6]

Phoenix next argues that the district court incorrectly performed the two-part analysis of *State ex. rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979), for awarding attorney fees. It contends that the court failed to identify the hourly rate or the number of hours to set the lodestar fee amount, see id. at 660–61, and failed to apply all the Burk factors for adjusting the lodestar, see id. at 661. Phoenix also claims that the court erred in its assessment of the evidence.

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[6] It appears that the first—and only—request for a hearing appeared in a pro se motion for reconsideration filed by Ms Knight As stated above, as a nonattorney, Ms. Knight could not represent Phoenix in this litigation. *See Tal v. Hogan*, 453 F 3d 1244, 1254 & n 8 (10th Cir. 2006) (collecting cases).

Phoenix's characterization of the district court's decision is inaccurate. Phoenix set its lodestar at $224,392.17. The court accepted this calculation and proceeded to adjust that figure in light of the Burk factors to arrive at a reasonable fee. See Burk, 598 P.2d at 661. The court observed that both parties' fees were unreasonable, due to multiple sets of counsel and the ineffective use of attorneys; that both parties contributed to the excessive fees; and that Phoenix's counsel spent some time on Phoenix's tort claims and Ms. Knight's counterclaims, which were unsuccessful. It also placed particular importance on the amount in controversy and the amount of recovery, only $8,980. The court properly considered these latter factors to be significant, as Oklahoma requires that an attorney fee be "reasonable in light of the amount sued for and recovered." *Sw. Bell Tel. Co. v. Parker Pest Control, Inc.*, 737 P.2d 1186, 1188 (Okla. 1987); see also id. at 1190. In these circumstances, we are not persuaded that the district court abused its discretion in determining that $49,000 was a reasonable fee. We therefore affirm the fee award to Phoenix.

2. Award to Capital and Financial

In appealing the fee award of $88,000 to Capital and Financial, Ms. Knight argues that the district court erred in giving no weight to her pro se response; that the court erred in awarding fees to Capital and Financial based on her contract claim even though she was similarly situated to Phoenix, which was successful on its contract claim; that the award was

excessive; and that Capital and Financial do not deserve an award of fees because of their bad faith and misconduct. (To the extent that Ms. Knight also adopts arguments made by Phoenix, they fail for the reasons discussed above.)

The district court declined to consider Ms. Knight's pro se response to Capital and Financial's attorney-fee motion. We acknowledge that three days before Ms. Knight filed her pro se response, she filed notice that she wished to proceed pro se. Still, the district court did not commit reversible error in giving no weight to the response. The response was not restricted to Ms. Knight's position, but purportedly also was submitted on behalf of Phoenix, an entity which Ms. Knight could not represent in court. In addition, it was somewhat duplicative of the response filed by counsel. On appeal Ms. Knight has not identified any argument in her pro se response that would have changed the result.

Ms. Knight also asserts that she prevailed in substance, and complains that Capital and Financial should not be able to recover fees on the contract claim because she and Phoenix (which was successful on its contract claim) were similarly situated. But legally she did not prevail, and she and Phoenix were not similarly situated. Damages are an essential element of a claim for breach of contract. *See Digital Design Group, Inc. v. Info. Builders, Inc.*, 24 P.3d 834, 843 (Okla. 2001). Phoenix had evidence of damages and proved a portion of its claimed damages to the jury's satisfaction. In contrast, as discussed in No. 09-

6075, Ms. Knight did not have any admissible evidence of individual damages. Thus, Phoenix was successful with its claim, whereas judgment was entered in favor of Capital and Financial on her claim.

Ms. Knight also argues that the amount of the award was excessive because the district court gave too much weight to Capital and Financial's evidence, did not properly weigh that Capital and Financial created the situation that led to increased fees, failed to consider that Ms. Knight did not enter the case until January 2008, and failed to consider that Capital and Financial would have borne the same expenses if Phoenix had been the only party. We see no abuse of discretion in the court's award. The court noted that both sides bore some responsibility for "a small to medium sized problem blossoming out of control." No. 09-6141, Aplt. App. Vol. II at 472. The court recognized that Capital and Financial improperly sought fees for time periods before Ms. Knight became a party. It thoughtfully reviewed the case, taking into account "the time spent on Ms. Knight's claims versus those involving Phoenix, the apportionment necessary to reflect time attributable to only the contract-based claim asserted by Ms. Knight against Mooring, and all surrounding circumstances" in arriving at its fee award. Id. at 476. Although Ms. Knight claims the district court erroneously believed that she and Phoenix "persistently" refused "to ever offer their suggestion as to what the appropriate payoff balance was," id. at 475, we will not reweigh the evidence. There is record support for the district court's view.

Finally, Ms. Knight contends that Capital and Financial are not entitled to an award of attorney fees because of their bad faith. "To strictly apply the American Rule in this case would be to do a great injustice to Knight and reward Mooring for its oppressive acts." Knight Aplt. Br. at 29. But the district court declined to find that Capital and Financial acted in bad faith. Further, the district court assessed blame for the protracted litigation on all parties, not just Capital and Financial. These determinations exhibit no abuse of discretion.

III. CONCLUSION

In appeal No. 09-6075, we GRANT the motion of Mooring Capital Fund, LLC, and Mooring Financial Corporation to file a surreply, DIRECT that the tendered surreply be filed, and AFFIRM the judgment of the district court.

In appeal No. 09-6141, we AFFIRM the judgment of the district court.

Entered for the Court

Harris L. Hartz

Circuit Judge

Appendix B

APPENDIX B -ORDER DENYING RECONSIDERATION OF FEES ORDER

Case 5:06-cv-00006-HE Document 373 Filed 07/08/2009 Page 1 of 1 J.Apx 528

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,)

Plaintiff,

vs.) NO. CIV-06-0006-HE

)

PHOENIX CENTRAL, INC., ET AL.,)

Defendant

ORDER

Defendant Judith Knight has filed a motion asking the court to reconsider its order awarding attorney's fees. Finding no basis to reconsider its decision, the court denies the motion to reconsider [Doc # 367]

IT IS SO ORDERED.

Judge Joe Heaton

Dated this 8 day of July, 2009

Appendix C

APPENDIX C --- ORDER OF THE WESTERN DISTRICT COURT OF OKLAHOMA for AWARD OF ATTORNEY FEES

Case 5 06-cv-00006-HE Document 363 Filed 06/08/2009 Page 1 of 12 J.Apx 467-478

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,)

)

Plaintiff,

vs.) NO. CIV-06-0006-HE

)

PHOENIX CENTRAL, INC., ET AL.,)

Defendants.)

ORDER

Pending before the court are the competing motions of the parties for attorney's fees. Plaintiffs Mooring Capital Fund, LLC and Mooring Financial Corporation ("Mooring") seek an award of $306,644.34 against defendant Judith Knight. Defendant Phoenix Central Inc. ("Phoenix") seeks an award of $224,392.17

Appendix C

against Mooring Capital Fund, LLC.

Background

It is unnecessary to recount in detail the long and tortured history of this case. Briefly summarized, Mooring acquired (following Phoenix's bankruptcy) a note previously executed by Phoenix and Knight in favor of a local bank. A dispute arose as to the proper payoff amount, eventually resulting in Phoenix's nonpayment of amounts due and in unsuccessful efforts to refinance the debt. Mooring eventually sought judgment against Phoenix on the note and foreclosure of the related mortgage. [1]Phoenix asserted various counterclaims based on the dispute over the payoff balance and damages allegedly stemming from it. Sometime later, Ms. Knight, the owner and president of Phoenix, sought to intervene in the suit to assert her own claims based on consequential damages she allegedly suffered due to the same dispute. Her effort to intervene was denied and the case progressed to a near-trial in 2007. Summary judgment was entered in Mooring's favor as to the foreclosure issues and as to most of Phoenix's counterclaims. However, due to late-delivered discovery by Mooring which created various factual issues, the summary judgment order was vacated in part and the case was reset on a new course toward trial[2] In the meantime, Ms. Knight

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[1] *The foreclosure action was filed in the District Court of Cleveland Conty, State of Oklahoma, and removed to this court.*

[2] *Summary judgment in Mooring's favor as to the foreclosure issues — principally related to disputes as to the application of*

had filed a new proceeding in Cleveland County asserting her own claims against Mooring. That case was also removed to this court and, in light of the intervening lapse of time,[3] consolidated with this case.

As the case then stood, Mooring was asserting its claim on the note against Phoenix and both Phoenix and Knight were asserting counterclaims against Mooring. [4]The parties ultimately resolved between themselves the remaining issues as to Mooring's claim, leaving only the Phoenix/Knight counterclaims for trial. They asserted claims for breach of the implied covenant of good faith and fair dealing, tortious breach of contract, tortious interference with business relationships, and tortious interference with prospective economic advantage, all generally based on the alleged consequences of the loan payoff dispute.

The case proceeded to trial in March 2009. As to the claims of Ms. Knight, the court concluded there was insufficient evidence to warrant them going to the jury and granted judgment for Mooring under Fed.R.Civ.P.

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payments made by Phoenix — remained intact The summary determination was vacated as to Phoenix's counterclaims.

[3] *Her efforts to intervene previously were rejected due principally to the proximity to trial That concern no longer existed by the time her refiled case was removed*

[4] *For reasons unknown to the court, Mooring did not sue Knight on the note although she was — along with Phoenix — a maker of it Similarly, Mooring does not seek to recover fees from Phoenix, only Knight.*

50.[5] As to the Phoenix counterclaims, the jury found in Phoenix's favor as to its claim for breach of the implied duty of good faith and fair dealing (i.e. the contract claim) and awarded Phoenix damages in the amount of $8980.00. It found it favor of Mooring on all of Phoenix's tort claims.

It is against this backdrop that the court must determine whether and how to shift or allocate the roughly $660,000 in attorneys fees apparently incurred by the parties.[6]

Discussion

This is a diversity case. In such circumstances, attorneys fees "are a substantive matter controlled by state law." Combs v. Shelter Mutual Ins. Co., 551 F.3d 991, 1001 (10th Cir. 2008). Oklahoma generally follows the "American rule" as to attorney's fees, which precludes the recovery of attorney's fees absent bad faith, specific statutory authorization or an agreement for their recovery between the parties. Id. Where a case involves multiple claims and the recovery of fees is authorized for only some of them, the court must apportion the fees. Tsotaddle v. Absentee Shawnee

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[5] *The court had previously sustained motions in limine excluding portions of the evidence on which Ms. Knight sought to base her damages claims*

[6] *Mooring made adjustments to the total fees it claims it incurred (an amount excess of $438,000) and reduced its fee request by thirty percent to the sum of $306,644.34*

Housing Auth., 20 P.3d 153, 162 (Okla.Civ.App. 2000). Further, under Oklahoma standards, the fact that the basis for the fee-bearing and non-fee-bearing claims are "inextricably intertwined" does not avoid the need to apportion. Combs, 551 F.2d at 1001-02.

The determination of what constitutes a reasonable attorney's fee is a matter addressed to the sound discretion of the trial court. Tibbetts v. Sight'N Sound Appliance Centers Inc., 77 P.3d 1042, 1046 (Okla. 2003). In general, the proper procedure in determining a reasonable fee is to determine the compensation on an hourly rate basis and then make appropriate adjustments based on what are sometimes referred to as the "Johnson factors."[7] Certain of those factors, particularly that of "the amount involved and the results obtained," have particular application here.

The court's analysis here is complicated somewhat by the manner in which Mooring has pursued, or not pursued, its fee application. Oklahoma law recognizes that, in some circumstances, both parties may be deemed prevailing parties for purposes of attorney's fees. Midwest Livestock Systems, Inc. v. Lashley, 967

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[7] . *See Johnson v. Georgia Highway Express, Inc , 488 F 2d 714 (5th Cir 1974), cited in Oliver's Sports Center Inc v National Standard Ins. Co., 615 P.2d 291 (Okla 1980). See also State ex rel Burk v City of Oklahoma City, 598 P.2d 659 (Okla. 1979)*

P.2d 1197, 1199 (Okla. 1998). Such a circumstance appears to be present here relative to Phoenix, where Mooring substantially prevailed in its action against Phoenix on the note and for foreclosure,[8] but where Phoenix prevailed on a counterclaim arising out of the same subject matter. However, rather than . seeking fees from Phoenix in connection with the note/foreclosure, Mooring has sought fees only against Ms. Knight.

The parties do not contest the reasonableness of the hourly rates charged by the various lawyers in this case. Similarly, although Mooring disputes whether the descriptions in certain time entries are sufficiently detailed, [9]there is no suggestion that the time claimed by a particular attorney was not actually spent in connection with the case. Employing the claimed hourly rates and time spent, Mooring indicates it

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[8] Mooring prevailed on summary judgment as to the issues directly related to the note balance and foreclosure, subject to resolution of one limited issue affecting the balance. The parties thereafter resolved the remaining issue and dismissed Mooring's claims on the note pursuant to an agreement In that agreement, Mooring reserved its right to pursue attorney's fees in connection with that portion of the case

[9] Mooring suggests that defendants' attorneys relied on block billing and insufficientlyidentified certain of the services on which time was spent While some of defendants' attorneys'time records are less detailed than would be desirable, the same is true of some of plaintiff's firms'records. However, the court does not view the deficiencies as pervasive enough to be material inthe context of this case Moreover, neither plaintiff's nor defendants' time records are sufficientlydetailed to be of much help as to at least some of the allocation issues involved here.

incurred fees of $438,000, but seeks $306,644.34 as a reasonable fee. [10]Phoenix seeks recovery of $224,392.17, which also reflects certain downward adjustments from the total amount incurred by Phoenix and Ms. Knight.

The principal factors involved in determining a reasonable fee include the results obtained by the various parties, the impact of some, but not all, claims supporting a fee recovery, various allocation issues, and general considerations bearing on the overall reasonableness of the fees sought. Many of these are necessarily judgment calls for which a detailed factual or mechanical analysis is not practical. The court is fully familiar with the case, having heard the trial and observed its course over several years of litigating. In these circumstances, and recognizing the need to avoid incurring even more attorney's fees to resolve the fee dispute, the court concludes a hearing is unnecessary to resolve the issues raised by the pending motions, which can be appropriately disposed of based on the parties' submissions and the court's familiarity with the case [11] All parties appear to concede that 12 Okla.

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[10] Mooring proposes two 15% downward adjustments in its fee request, to reflect its view of the proper apportionment between fee-bearing and non-fee-bearing claims and to adjust for any time entries which are insufficiently detailed.

[11] Oklahoma law contemplates an adversary hearing for making certain fee determinations See Morgan v Galilean Health Enterprises, Inc., 977 P 2d 357, 364 (Okla. 1999) (dicta). However,as that is essentially a procedural requirement, the court concludes it is not binding here.

Stat. §936 [12] is applicable to the contract based claims on which someone prevailed. As §936 appears to provide a sufficient basis for recovery of fees by the prevailing parties on the contract claims, it is unnecessary to determine whether the note provides an alternative basis for such fees.[13]

To the extent that both sides object to the overall reasonableness of the fees sought by the other, the court agrees. This case is a classic example of a case involving a small to medium sized problem blossoming out of control, with fees and costs dwarfing the amounts reasonably in issue — and both sides can take some credit for that. The case has been very heavily lawyered, with substantial fees incurred in duplicative efforts, time spent bringing new lawyers up to speed, and the like. During much of the course of this case, Mooring simultaneously used the services of two different law firms, with the time records indicating a substantial amount of overlap in their efforts and significant time spent consulting with each other about the action's progress. Neither of these firms survived to be the firm ultimately presenting the

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[12] Section 936 provides, in pertinent part: "In any civil action to recover on a note, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs

[13] To the extent that Mooring suggests the note provides a basis for recovery against Knight on her tort-based claims, the court concludes otherwise. Mooring provides no authority to support the idea that the note language would extend to other than contract-based claims

case for trial. Similarly, Phoenix and Knight used four firms of lawyers at one time or another, with the first firm withdrawing after the first settlement conference, the second firm withdrawing some time after the second settlement conference, and two different firms then finishing up the case. To say the least — and even acknowledging that the activity level of one side's attorneys is necessarily related to the activity level on the other side — the parties' use of attorneys has not been efficient.[14]

The substantial fees are due in part to the fact that this case has been prepared for trial twice. Both parties were nearly ready for trial when the court granted summary judgment to Mooring in 2007. Thereafter, Mooring belatedly produced discovery it should have produced earlier, necessitating the revisiting and partial vacation of the summary judgment. This resulted in additional discovery being necessary and further delays before the case could be ready for trial a second time.[15]

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[14] *The multiple withdrawals by Phoenix's counsel after settlement conferences, coupled with the extent of defendants' demands at trial, suggest there is some force to Mooring's argument that defendants had unrealistic expectations for the case However, as Mooring did not invoke the Fed R Civ P 68 procedure for offers of judgment, the reasonableness of defendants' settlement posture is of little or no impact in resolving the present motions.*

[15] *Mooring's carelessness in discovery (and the circumstances do suggest carelessness rather than intentional misconduct, as defendants suggest) followed on the heals of substantial discovery*

Appendix C

With respect to the fee claim of Mooring, it is clear that Mooring is the prevailing party as to all claims against Ms. Knight and there is no question but that it prevailed both in form and substance. However, it is also clear that Mooring is entitled to recover an attorney's fee from Ms. Knight only on the contract-based claim upon which it prevailed – Ms. Knight's claim for breach of the implied covenant of good faith and fair dealing. Prevailing on the other claims, all of which sound in tort, is not a basis for fees under Oklahoma law. Mooring suggests that the apportionment required by Oklahoma law be effected by a 15% adjustment to the amounts it otherwise incurred. It does not state a basis for this percentage adjustment and, as a practical matter, a less arbitrary estimate is difficult to determine. Nonetheless, the court concludes an apportionment to the non-fee-bearing claims in excess of 15% is appropriate.[16]

The bigger apportionment issue with respect to Mooring's motion relates to the fact that it seeks fees only against Ms. Knight. A substantial portion of the fees Mooring incurred were with reference to its claim

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problems caused by defendants and defendants' dodging and weaving as to expert witnesses, all of which also contributed to the costs of litigation

[16] *Although there was substantial overlap in the evidentiary basis for the various claims, the number of tort claims versus the single contract claim, the additional time likely spent related to defending possible punitive damage exposure and other* circumstances suggest 15% is too conservative an adjustment

against Phoenix — not Knight. [17]Indeed, Mooring's request includes attorney time spent for periods when Knight was not even a party in the case.[18]

Although there was substantial overlap between the claims of Phoenix and Knight (indeed, much time was spent in forcing defendants to focus on which claims or damages were Phoenix's, versus Ms. Knight's), it is nonetheless clear that a portion of the time spent by Mooring's attorneys was attributable to its claims against, or defending those asserted by, Phoenix

. Phoenix also suggests that Mooring's request is unreasonable because the case itself, or at least the substantial fees incurred in excess of those involved in an ordinary mortgage foreclosure, were due to Mooring's inability to state an accurate, or even a single, payoff balance.[19] It is true that Mooring's statements of the amount due varied — that was, in substantial part, what the case was about. However, it is also true that Mooring's confusion was due, in part,

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[17] See supra note 4

[18] Approximately half of the fees sought by Mooring relate to time spent before she became a party Oddly, Mooring objects to Phoenix's request for fees for Mr Watson prior to his formalentry of appearance in the case but seeks fees against Ms. Knight for periods when she was not even a party in the case

[19] Phoenix's objections to Mooring's fee motion came in the form of one response filed by its counsel [Doc #350] and one filed by Ms Knight "pro se" [Doc. #353] As *corporations may not appear pro se, LCvR17 1, and the "pro se" response is, in any event, largely a reargument of the case on the merits, the court has given no weight to it.*

to confusion in the naming of documents filed by Phoenix in its bankruptcy. Further, it is also true that the dispute was not readily resolved and this case drug on for years due, in substantial part, to the persistent refusal of Phoenix and Ms. Knight to ever offer their suggestion as to what the appropriate payoff balance was. Ms. Knight, as a former CPA, plainly had the skills and training to do so but, for reasons still not clear, never thought it appropriate to take the simple, problem-solving step of saying "Here's what I think the balance is...," so that Mooring and Phoenix could then identify the bases for their competing payoff computations. That this case blossomed into something far more than a "routine mortgage foreclosure" was due in no small measure to defendants' refusal to take obvious steps which could have solved the problem. To the extent that defendants' intransigence contributed to the attorneys fees incurred by Mooring in this fight, they are in no position to object to them

. Taking all these factors into account — the time spent on Ms. Knight's claims versus those involving Phoenix, the apportionment necessary to reflect time attributable to only the contract-based claim asserted by Ms. Knight against Mooring, and all surrounding circumstances — the court concludes Mooring is entitled to receive an attorneys fee of $88,000 to be paid by Ms. Knight.

The fee request of Phoenix is subject to some of the same issues which impact Mooring's. It is reasonably clear that a substantial portion of Phoenix's fees are

attributable to time spent on its tort claims, rather than the contract-based claim on which it prevailed, and are hence not recoverable from Mooring.[20] As was true with Mooring's request, it is difficult to segregate that time in the circumstances of this case, but nonetheless an adjustment is warranted. Similarly, the time spent in pursuit of Ms. Knight's counterclaims is not recoverable by Phoenix. Recognizing this, Phoenix has made significant redactions, principally from the time otherwise charged by Mr. Watson and Mr. Brown, for time spent on Ms. Knight's claims While certain adjustments to the time of others is arguably appropriate, the court concludes the indicated redactions reasonably approximate the time attributable to the Knight claims.

The bigger problem for Phoenix — and the only one of the "Johnson factors" which has much force here — is the matter of "the amount involved and the results obtained." As noted above, it is somewhat problematic to incur $224,000 in attorneys fees trying to solve what appears to have been a dispute initially involving a hundred thousand dollars or less. Defendants

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[20] *Phoenix argues that virtually all of its discovery and other efforts would have been the same even if it had only asserted the single contract claim. That may be somewhat overstated, but the court recognizes the substantial overlap in the nature of, and necessary preparations related to, the various claims. However, as the degree of "interrelatedness" of the claims and efforts appears to be the same for both Mooring and Phoenix, the adjustment made in this regard has been applied equally to both parties*

claimed substantial consequential damages flowing from the dispute, but the underlying dispute with Mooring was in the ballpark of less than one hundred thousand dollars.[21]

However, the biggest factor here is the matter of the results obtained.[22] Phoenix ultimately asked the jury for compensatory damages of just under a half million dollars. The jury awarded $8980 on the contract claim (breach of implied duty of good faith and fair dealing) and found for Mooring on all the tort claims. An award of $8980 qualifies Phoenix as the prevailing party on its contract-based counterclaim and the court views that recovery as something more than nominal. Nonetheless, it was clearly and substantially less than what Phoenix sought and was, as a practical matter and in the circumstances of this case, a substantial victory for the plaintiff. The results obtained plainly require a substantial downward adjustment in the amounts claimed by Phoenix.

Taking these factors into account - – the time spent, the impact of its gyrations as to discovery and experts,

---

[21] *The court recognizes that the fees necessary to resolve a dispute via litigation will, at times, unavoidably exceed the amount in controversy. Nonetheless, that proportion is one of many factors which bear on the reasonableness of the fees incurred.*

[22] *Although Mooring did not explicitly request fees against Phoenix for the claims on the note/foreclosure, see supra note 4, the court has considered, as part of its analysis of Phoenix's "results obtained," that Phoenix did not substantially prevail as to those claims*

the repetitive lawyering-up, the apportionment necessary to reflect time allocable only to the contract claim and, most importantly, the results obtained relative to amount sought — the court concludes Phoenix should recover attorneys fees of $49,000 from Mooring Capital Fund, LLC.

In light of the foregoing, plaintiff's motion for attorneys fees [Doc. #340] is GRANTED. Mooring's judgment against Ms. Knight shall include recovery of attorneys fees in the amount of $88,000. The motion of defendant Phoenix Central Inc. for attorneys fees [Doc. #343] is also GRANTED. Phoenix's judgment against Mooring Capital Fund, LLC shall include recovery of attorneys fees in the amount of $49,000.

IT IS SO ORDERED.

Dated this 8th day of June, 2009

[Judge] Joe Heaton

Case 5:06-cv-00006-HE Document 363 Filed 06/08/2009 Page 1 of 12.

APPENDIX D – ORDER OF THE UNITED STATES DISTRICT COURT OF WESTERN OKLAHOMA MERITS CASE March 12, 2009

Case 5:06-cv-00006-HE Document 335 Filed 03/12/2009 Page 1 of 2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,)

Plaintiff,

vs.) NO. CIV-06-0006-HE

)

PHOENIX CENTRAL, INC., ET AL.,)

Defendants.)

JUDGMENT

In accordance with the jury verdict rendered on March 12, 2009, and the Court's decision granting the plaintiffs' Fed.R.Civ.P. 50 motion with respect to the claims of defendant Judith Knight, judgment is entered as follows:

In favor of defendant Phoenix Central Inc. on its contract claim for breach of the implied covenant of good faith and fair dealing and against defendant Mooring Capital Fund, LLC for the sum of $8,980.00.

In favor of plaintiff Mooring Capital Fund, LLC

and against defendant Phoenix Central Inc. on the defendant's claim for bad faith breach of contract.

In favor of plaintiffs Mooring Capital Fund, LLC and Mooring financial Corporation and against defendant Phoenix Central Inc. on the defendant's claims for tortious interference with business relationships and tortious interference with prospective economic advantage.

In favor of plaintiffs Mooring Capital Fund, LLC and Mooring Financial Corporation and against defendant Judith Knight on all claims.

IT IS SO ORDERED.

Dated this 12th day of March, 2009.

/s/Joe Heaton

APPENDIX E – CONSTITUTION AND STATUTORY PROVISIONS

Oklahoma Constitution - Article 14 § 2

Classification of loans and lenders - Licenses - Maximum rates of interest.

The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest, all contracts for a greater rate of interest than ten percent (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum.

Oklahoma Constitution - Article 14 § 3

Excessive rate - Forfeiture of interest - Recovery of double interest.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm, or corporation taking or receiving the same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract:

Appendix E

Provided, However, That this section may be subject to such changes as the Legislature may prescribe.

15 O.S. Section 266

The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest, and by contract parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted.

23 OS, Section 21

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

23 OS, Section 61

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not.

23 OS, Section 64

The detriment caused by the wrongful conversion of personal property is presumed to be:

Appendix E

1. The value of the property at the time of the conversion with the interest from that time; or,

2. Where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,

3. A fair compensation for the time and money properly expended in pursuit of the property.

APPENDIX F – RELEVANT TRANSCRIPT EXCERPTS (line numbers omitted)

Pre-trial on March 6th:

Alleged lack of documents:

THE COURT: There is also some concern, I think, in several spots that there are aspects of her testimony that are not supported by documents. It seems to me that goes essentially to the weight to be given to her testimony, and I don't see that that's a basis for any sort of categorical exclusion of her testimony simply on the basis she can't point to a particular document for certain things. So at any rate, I'm not going to exclude her testimony on damages as a whole on any of those grounds. Transcript 20:10-17

Exclusion of Ms. Knight's damage testimony

THE COURT: With respect to that, which is the 701 factors, it seems to me that for her to come in and essentially to project lost profits based on development of the 40 acres, or projections based on what she would have done with the proceeds and the houses, it necessarily involves the sort of testimony that would have to be expert rather than lay witness testimony.

THE COURT: "It is true that 701 recognizes some limited exceptions where the owners of the property or the owner/operators of a business can testify to things that have kind of an expert feel to them, but it seems to me those exceptions don't stretch to what we're talking about here. If the question as to either the 40 acres or the Village houses-as I say, I don't know if

that's two or five, but whatever it is-if the question was what those properties were worth at a particular—at this time or at some point in the past, I think the exceptions to 701 that are recognized would permit Ms. Knight as an owner to testify to it."

"But that's really not the question we have here. The question here is not what their value was—is today or was yesterday, but rather what the profits from them would be if they were developed in a certain way and then sold at some point in the future. That, it seems to me, is beyond the scope of what the cases suggest is appropriate for essentially lay witness testimony by an owner." Transcript p. 22:21-23:13 Aplt sup 747-748

The other exception that has potential application here apart from the owner testifying as to the value of property that have to do with an owner or business insider estimating lost profits. And it seems to me that that exception also would not extend to permitting Petitioner to testify to essentially the lost profits on the 40 acres and the houses.

The deposition testimony and background stuff that's been pretty, I think, thoroughly developed in attachments that I've seen to the motions indicate that she's not - -She has no business history in terms of land development. And there is no history of that sort with respect to the Village houses such as could constitute a business for which they could estimate lost profits. Transcript 23:14-24:3.sup 748-749

I think it necessarily involves some things that she doesn't have the ability drawing on her experience as a

business operator or business owner to testify to those two categories. Transcript 23:15-24:6

It does seems to me, and I would deny the motion insofar as it goes to Ms. Knight testifying about expected profits from the shopping center. I think that her situation there does qualify for essentially a recognized exception to the 701(c) requirement. I think the cases recognize that a business owner can testify about a business's lost profits so long as they are doing it based on firsthand information and it's rationally based on perceptions of the witness and so on. And it would seems to me that here where Ms. Knight has been the actual operator of the shopping center and so on that she would fall within the parameters of that exception as a lay witness to offer testimony as to anticipated rental income or the net -- ultimately, it's a lost profits calculation, but the profits that she would have expected to generate under whatever the scenario is. Transcript 24:14-25:3

701 Factors

MR. WARD: Just one last comment I would make, your Honor; I'm not going to belabor the point. If under 701 I can give a lay opinion as to the value of my real estate, which I think I can in virtually any court, how am I going to get my opinion other than by looking at comparables, talking to people that might have sold comparable property, following it on the internet, looking up that kind of information, attending auction sales, looking at my tax records, seeing how it was appraised, and trying to do some computations from what the assessor says it was

worth, things of that nature, all require steps outside of my limited specific knowledge in order to be able to formulate such an opinion. Quite frankly, it appears to be kind of the same process that I would have to go through if I was going to give an opinion on what it would take to develop a parcel of property.

THE COURT: Again, I think you're right about that. But the cases that I've read suggest that when—the nature of the exception the cases recognize for an owner in valuing their own property presupposes they are going to base it on a lot of things that may or may not be otherwise admissible, but it's the kind of things that an owner would routinely consider. But seems to me that is different from what we're talking about here where the testimony to be pertinent in this case would not have to go to the issue of what Black Acre was worthy today, or at some point in the past, but instead what Black Acre would be worth if we come in and put the streets and develop it and sell it with a marketing plan and all those sorts of things, that, as I say, in my view begin to involve things beyond what the cases suggest an owner's experience-based expertise would extend to. Tr .Pg 44:10-45:1-14

Now, certainly in the case that I cited where Mr. Phillips was able to give the opinions, but he was a developer, he had developed these particular lots. She would offer the testimony that she went about the process of determining how she was going to develop her 40 acres of land, the steps that she took, all of the information that she gathered, the fact that there was an adjacent development that she used as a

comparable. She knew the area, she knew the size of those lots, she determined how much it was going to cost her to put in the infrastructure, such as the streets. Being a rural type of addition, she was not going to have to have any kind of curbs and gutters, she determined the prices of developing that 40-acre tract. She also knew what the comparable one acre lots were selling that were immediately adjacent, and that was the way that she projected her profits on that particular project.

So I think she would offer the evidence that even though she had never developed raw land before, she's a reasonably intelligent person who could go about those same processes and make those determinations to determine what the costs were going to be, and what the profitability would be in order to determine what the net profit or the net loss from such a project would be. I just offer that as being a different standard on the 40 acres as going back to 1992 and 1993. We're talking about a different time period, we're talking about a different damage theory, we're talking about a different controlling damage section that would govern those issues.

THE COURT: Well, insofar as it relates to the evidentiary question, I understand your position, but I'm nonetheless of the opinion that I think she's going out to look at comparables and drawing information from other experts and so on, that process I think takes it outside the scope of what 701 contemplates as proper lay testimony. Transcript 41:25-43:7

Appendix F

Re: Standards - measure of damages

MR WARD: I know that when the Court made its order in August of '07, from reading those orders, which were lengthy and very detailed, that at that time the whole center of the discussion was that there was one theory left, and that was the bad faith type of theory in terms of the breach of contract, the implied covenant, good faith and fair dealing, and the damages that would flow under 23 OS, Section 21. When the Court then vacated that particular order on March 28th of the following year, '08, it seemed to put everything back into perspective, and I think that's kind of what the Court's comments have been earlier this afternoon. The theories then have become much more broad in terms of being tort as well as contract in nature. And the contract damages are governed by 23 21 and the Floormax and related decisions. And I think the Court pointed that out in the prior orders as well.

Now we shift to 23 OS, Section 61, which is the damage measure for these tort theories, and that has a different standard than does 23 21. And I will point to the language specifically to which I'm making reference. And it says, and it's very short:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

And I point to that last phrase, whether it could be anticipated or not, as being the key and significant difference between a theory that precedes flowing from breach of contract and the damages therefrom, and the damages that flow from a tort theory. Because whether it could be anticipated or not is not quite the same standard as Section 21 of Title 23, certainly not the same standards that the [Florifax] case discusses in great depth the and detail. Tr 38:20-40:4 P 761-762

The one case that I see that is of some assistance in these issues flowing out of the 61 section, which is the tort damage section, is a case called King versus Neal, and it's a 2001 Oklahoma case, 2001 Oklahoma Civil App. 11, at 19 P.3d 899. And this was a case where they talk about the damages and how they flow again.

And I think it's a distinguishing case of what the juries can do with damages depending on what the theory is and how tight that you're bound by this language of Section 21 as opposed to whether it could be anticipated or not. And I think when you made your comments about 1993 and 1994, those comments to me at least are extraordinarily relevant and apropos to the breach of contract theory. But as to the tort theories, those theories start developing factually in the 2002, 2003, and carry on up until 2007. So we're working with

THE COURT: I agree with that. I think it would be a different time period you would be making evaluation from.

MR. WARD: You're making a different evaluation, different period about what is the detriment that flows from the breach, whether it could be anticipated or not. And so then, of course, the other side has the problem of whether it would be anticipated or not is not the material factor. We don't get into Hadley versus Baxendale, we don't get into Floormax when you have that particular standard being the governing damage section.

So I simply point that out to the Court. And I certainly understand the Court's logic and rationale pointing out that even under 701 that you have serious doubts as to whether she would possess the requisite expertise to give these kind of lay opinions. Tr pg 40:20-41:24

THE COURT: With respect to your points on the different standards, I'm in complete agreement with you that there is a difference between the contract claims and the tort claims here. The old wonderful Hadley versus Baxendale and contemplation of the parties and all that, that applies only to contract claims. And I think you're right that the 92/93 time period that we would be talking about there, which is different from the tort stuff.

But I did give some considerable thought to the thing that you're mentioning about the language in the tort statute that talks about anticipated or not anticipated, or whatever that language is, and in particular the ways that the Oklahoma courts appear to me to apply it. Of course, the whole language is that it has to be proximately caused, or the word "proximate" is in

there, potentially including unanticipated stuff. The cases that state the standard in a tort case for Oklahoma, and I recall in particular I think there was a Stroud case, Stroud versus something, that nonetheless talked in terms of, and I presume it would be by reason of how they applied the word "proximate" to it, that it did require that the damages be foreseeable. And that's not the same thing necessarily as contemplation of the parties, but it is that -- the question, it seems to me, is if there is some evidence from which the jury might conclude that these sorts of consequential damages is foreseeable, it just seems to me there is a step gone. I agree that conceptually that there are different theories. I think that is plainly correct. But I think my view of it is as I've indicated. Tr 43:2 to 44:9 pg 765-766

Friday 6th Page 6:1-5---Alternative claims:

THE COURT: Let's talk about clarifying the claims that we've got involved here. The proposed pretrial order appears to me to have an awful lot of stuff in it that is kind of water under the bridge in terms of this case. I don't know, maybe it's in there to preserve a position or something. Transcript 6.1-6:5

But what I'm trying to deal with here is trying to make clear that—the sorts of things I was noticing in the pretrial order, we've got stuff about violations of the bankruptcy code, conversion claims based on how the payments were applied, stuff like that that in my view have already been disposed of. All I'm trying to clarify is whenever I get around to adopting this pretrial order I'm not reviving or expanding the claims

at issue.

So subject to whatever you may ultimately persuade me of in terms of the evidence, there has been some reference to gross negligence here, and I think that's consistent with my prior orders, that mere negligence is not a basis for liability, but wanton negligence or something more may be.

So at any rate, let's be clear then that when and if I approve the final pretrial order here it's not going to be understood to revive these other claims that were disposed of previously. Transcript 7:9-24 sup 734-735

The motion in line which is 298 that refers to the attorney fees and expert fees issue. It seems to me that issue is essentially the same one that I addressed before, and I don't see any reason to come down in a different place. ... As matters of cost rather that plaintiff's potential damages. But at any rate, I'm in the same place on that one. 15:12 p 739:740

Re: post-litigation calculations of loan balances as to admissability

THE COURT: There's also several of them that are objected to on the basis that they involve settlement discussions. Tell me what those are about. What kinds of exhibits are you talking about there? Tr. 10:21-25

THE COURT: Are those kinds of documents, though, are they literally something that says we've got a dispute and here is how we propose to compromise it, or is it a statement of account that says here's what our records show about the payments that were made and how we applied them?

Appendix F

MR. SWEDLOW: Actually, the best way to describe it is, both at same time,...Tr. pp. 10:21--11·7

The COURT: But you think potentially there are still some that are not lableled that way that you would view as settlement documents? Tr. pp. 11:22-25

Mr. Swedlow I think there is going to be a subset that might not have an overlabel, but if we see a revised abbreviated list of just what Stan and Rod intend to introduce, then maybe they won't have picked any of those and that will become moot, and if so, we'll have a very finite universe to talk about. Tr. 11:25-12:5

THE COURT: Well, I don't know. It just seemed to me that may be kind of a hard line to draw in this case where the essence of their case is that the allegation of an improper payoff being quoted, and it's a little difficult, I think, to determine when there's that versus a settlement discussion. Tr. 12:6-10

Discussion about negligence claim

Friday 6th

THE COURT: I would see as four claims. Is there any dispute that those four claims are still teed up here?

MR. WARD: Your Honor, I think maybe one was left out. We also have a gross negligence theory.

THE COURT: Well, but I think—I see that as essentially being a tortious bad faith breach claim. Do you see that something different than bad faith breach?

Appendix F

MR. WARD: I think it's a little different in terms of what some of the elements are and treated as two different torts under the Oklahoma common law. But that's the way it's been alleged, at least, throughout those amended pleadings. Tr 6-12:23 sup 733:734

March 11:

THE COURT: Mr. Ward, you had indicated at the pretrial on Friday that you viewed the claims in this case as including a claim for gross negligence .... over and above the other tort claims are asserted here. I'm having some trouble figuring out how there would be a tort claim that is separate and apart from the tortious breach of contract claim.

MR. WARD: Your Honor, it's my belief that there are two separate and distinct tort theories, the same operative facts give rise to different legal theories. Oklahoma clearly recognizes negligence, ordinary negligence and gross negligence, as the Court already understands. The gross negligence, and there's a great short treatise in AmJur on this very matter, is where there is a series of continuing ctions such as we believe the evidence has proved in this particular case, repeatedly not getting the amount correctly stated to a borrower, that continuity of actions constitutes gross negligence and falls out of the realm of ordinary negligence. The only difference being, of course, one gives rise to punitive and exemplary damages and the other does not. The tortious breach of the contract theory, your Honor, is basically rooted in the 1983 case of Woods Petroleum, Inc. versus Delhi. And that's the case that picked up on those five or six cases that go

back into the 20s and 30s that basically say that even in a situation where there's an agreement that forms the contractual basis for a relationship between two parties, the failure to exercise ordinary care, skill, and reasonable expediency and faithfulness gives rise to the tortious breach. Then the second line of cases came out in 1996, with Beshara versus the bank, I think it's Southern Oklahoma bank. That particular decision says in limited circumstances, and that was a banking-related case, it says that we will find that there is a tort as well as a breach of contract when the covenant of good faith and fair dealing that one party owes to the other is breached and violated. So that's the two theories.

THE COURT: Here's the part that I'm—the point at which I'm having trouble. Of course, I haven't read the brief that was submitted, and it may be that there's some argument here as to whether the bad faith breach claim is even available. But that's not my concern for the moment. I guess my concern is that to the extent you're arguing for a separate tort of negligence, albeit gross or simple, but something separate from the tortious breach claim, what would be the source of the duty if you don't look to the same implied obligation coming out of the contract? I'm just having a hard time seeing how there is two different --

MR. WARD: I think the duty is that duty of faithfulness and reasonable expediency that the lender owes to the borrower to deal in good faith What I'm really saying is, is that the implied covenant of good faith and fair dealing that exists in every contract in

Oklahoma, save and except at-will employment contracts, is the same implied covenant of good faith and fair dealing that's implicated under a Beshara type of tortious interference case, tortious breach.

THE COURT: I'm not sure we're wresting with the same problem here. If my conclusion is that you have available to you a claim for tortious breach of contract under the law and the evidence that's been presented here, do you care whether there's a separate claim for something we call gross negligence? Does it make any difference?

MR. WARD: I don't think it makes any difference. And I don't think that at this juncture, your Honor, that we're really—there's a third claim, too, that is also the tort claim and intentional interference, but I think it's basically all a preponderance of the evidence test, and the elements of each are somewhat different. But in the last analysis, you have to have a finding that there's going to be a duty of care that was breached by someone's reckless type of behavior or intentional behavior that resulted in damages to Phoenix Central. So I think the same elements kind of permeate and flow back and forth. So in terms of the simplicity of the instructions, if that's what the Court's leaning is to simplify the tort theories into one, I would not have any basic disagreement with that approach. Tr. 554:13-557:18

On March 11, 2009: Allowing tort claim in Phoenix case

THE COURT: Well, let me cut this short here. I think

at least in part I can. Insofar as the Rule 50 motion raises the availability of the legal theory of tortious breach of contract in this circumstance, the motion will be overruled. I have previously addressed that issue in this case in one of the prior orders and concluded it was an available theory if the evidence was sufficient to create a question as to wanton or reckless conduct. And as I read the cases, that does make it available here. Tr. 561:12-20.

Appendix G

APPENDIX G – APPELLANT'S FIRST BRIEF
MERITS CASE 09-6075
(July 17th Brief with Appendix references substituted) FILED August 2, 2009
Note: References to Page numbers internal to this brief are indicated as [___a] to show location in this appendix for the Court's convenience since reformatting loses relevance in original.
No. 09-6075

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDY KNIGHT and PHOENIX CENTRAL

Defendants/Counter Claimants/Appellants

vs.

MOORING CAPITAL FUND, LLC and MOORING FINANCIAL CORP,

Plaintiffs/Counter Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
No. CIV-06-0006-HE
HONORABLE JOE HEATON, DISTRICT JUDGE

Appendix G

APPELLANT JUDY KNIGHT'S PRINCIPAL BRIEF

July 17th Brief with Appendix references substituted

ORAL ARGUMENT REQUESTED

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July 17th Brief as amended on

August 2, 2009

Appendix G

CERTIFICATE OF PRO SE APPELLANT

This appeal is a civil case involving more than one appellant, Judith Knight and Phoenix Central, Inc. Pursuant to 10th Cir. R. 31.3 the appellants have filed separate briefs because Knight intended to file pro se due to the multiple and various issues in this case, her intimate knowledge of the facts, her limited finances created by the circumstances of which this case complains, the ruling that Phoenix Central, Inc must be represented by counsel, and the time restraints arising therefrom.

Appendix G

TABLE OF CONTENTS

Page No

TABLE OF AUTHORITIES . PAGE 72

APPELLANT'S OPENING BRIEF 78

JURISDICTIONAL STATEMENT 78

STATEMENT OF ISSUES AND THE CASE 79

ARGUMENTS 86

Proposition I. 86

STANDARD OF REVIEW 86

Proposition II 88

APPELLANT HAS CREATED A QUESTION OF FACT AS TO WHETHER MOORING' REASONS FOR ITS' BAD ACTS ARE UNWORTHY OF BELIEF 88

a Mooring has continually presented arguments that have no basis in fact or in law 88

a. Mooring admitted that its arguments in defense of counterclaims had no relevance to the facts. 99

Proposition III. 101

THE TRIAL COURT ERRED IN NOT PRESENTING NEGLIGENCE TO THE JURY WHEN APPELANTS HAVE PROVEN A PRIMA FACIE CASE OF NEGLIGENCE 101

Appendix G

See Appellant Phoenix Central, Inc.s' Principal Brief as though pled herein. 101

Ruling - (Negligence Transcript 6:1-7:8) 101

c. The Court erred when it dismissed the claims of Negligent Non Disclosure and Negligent Misrepresentation and there is a question whether the court appropriately dismissed the claims of Mini Malls of America 106

a A duty is not required under negligent misrepresentation to give rise to a cause of action. 108

b. When a party has violated an act or statute, negligence may be inferred 118

c. Burden of Proof – Negligence Per Se - Violation of Usury Laws and Conversion 118

Proposition IV. 119

THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW CERTAIN CLAIMS 119

a. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF USURY 121

b. (b.) THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF CONVERSION .123

c. (c.) THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF UNJUST ENRICHMENT 125

d. (d.) THERE IS ADEQUATE EVIDENCE TO PROVE THAT FINANCIAL VIOLATED THE FAIR DEBT AND COLLECTION ACT and

Appendix G

Restatement of Torts Section 552. 126

Proposition V. 126

THERE IS SUFFICIENT EVIDENCE TO PROVE A CAUSAL CONNECTION TO THE DAMAGES 127

Proposition VI. 136

THE TRIAL COURT ERRED WHEN IT DENIED APPELANTS RIGHT TO ADMIT CERTAIN EVIDENCE INTO THE TRIAL RECORD..... 136

a All damages sustained by Knight, individually 137

Proposition VII. 140

THE TRIAL COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF THE EXPERT AND KNIGHT. 140

Proposition VIII. 140

THE TRIAL COURT STATEMENTS AND ACTIONS AS RELATED TO KNIGHT'S CLAIMS AND DAMAGES WERE INCONSISTENT WITH DECISIONS RELATED TO PHOENIX..... 140

CONCLUSION 140

STATEMENT REGARDING ORAL ARGUMENT 141

CERTIFICATE OF COMPLIANCE..... 141

Appendix G

TABLE OF AUTHORITIES PAGE

Cases

Atherton v. Devine, 602 P.2d 634, 636 (Okla.1979). 135

Beshara v. Southern National Bank 1996 OK 90 928 P.2d 280 67 125

Bettis v Brown.....103

Bowers v. Hardwick, 478 U.S. 186, 201 (1986).....120

Boyles v. Oklahoma Natural Gas Co., 1980 OK 163, ¶ 14, 619 P.2d 613, 618 (Okla. 1980) 118

Brigance, 725 P.2d at 305.....132

Christian V Home Assurance Co., 577 P.2d 899, 902 (Okla.1977.....116

Coe v. Esau, 377 P.2d 815, 820 (Okla. 1963) 102

Coker v. Southwestern Bell, 580 P.2d 151 (Okla. 1978) 133

Cook Assocs., Inc. v Warnick, 664 P.2d.1161, 1665, (Utah 1983)..... 139

Davidson v. First State Bank & Trust Co., Okl., (1976). 124

Delbrel 103

Djowharzadeh v. City Natl. Bank & Trust Co 111

First Nat'l Bank and Trust v. Kissee, 859 P.2d 502, 509 (Oklah. 1993).....116

Appendix G

Gaines v. Providence Apartments, 750 P.2d 125, 126-27 (Okla.1987); 135

Garner v. Myers, 1957 OK 224, ¶ 5, 318 P.2d 410, 413 118

Gasko v. Gray, 1972 OK 141, ¶ 23, 507 P.2d 1231, 1235 118

Genis Credit Corp v Anderson in re Jan Weilert RV, Inc 315 f.3d 1192 10th cir 2003. 118

Griffith v. McBride, 188 Okl. 227, (1940);..... 124

Hargrave v. Canadian Valley Elec. Co-op., , ¶ 14, 55 102

Harman v. Willbern, 227 F. Supp. 892, 894 (D.C. Kan. 1964). 120

Hessco Industries In 9th bap 2003 118

Howell, 272 S.E.2d at 23 114

Hulse v. First American Title Company of Crook County, 2001 WY 95, ¶ 52, 33 P.3d 122, ¶ 52 (Wyo.2001 110

Jackson v. Glasgow, Okl.App., 622 P.2d 1088 (1980). 116

Jackson v. Jones, 907 P 2d 1067, 1073 (Okla.1995). 136

Johnson v. Mid-South Sports, supra, at 1109... 135

Jones v. Mercy Health Center, Inc., 155 P.3d 9, 14 (Okla. 2006)..... 131

Manora v. Watts Regulator Co., , ¶ 10, 1058..... 102

Appendix G

McKenzie v. Dovala, 242 F.3d 967 (l0th Cir. 2001)....86

Oklahoma Natural Gas Co. V Courtney, 182 Okl. 582, 79 P.2d 235, at page 240 132

Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975) 124

Pacific Insurance Co. of New York v. Frank, Okl., 452 P.2d 794 (1969).....119

Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 784 P.2d 475, 478 n.1 (Utah Ct. App. 1989).....139

Randle v. City of Aurora, 69 F.3d 441, 453 (10th Cir. 1995 88

Reeves v. Crum, 97 Okl. 293, 225 P. 177.....112

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133,120 S.Ct. 2097, 2110 (2000 87

Reeves, 120 S.Ct. at 2101 87

Shoopman v. Travelers Ins. Co., 1974 OK 6, ¶ 12, 518 P.2d 1108, 1110-11 118

Simms v. Oklahoma, i6 F.3d 1321 (l0th Cir. 1999), cert. denied, 120 S.Ct. 53 (1999.....88

State ex rel. Pollution Control Coordinating Board v. Kerr-McGee Corp., Okl., 619 P.2d 858 116

State v.Fernandez-Medinu, 14 1 Wn.2d 448, 6 P.3d 1150 (2000) 120

Steenbergen v. First Fed. Sav. & Loan of Chickasha, , 1332 (Okla. 1987), ...124

Stuckey v. Young Exploration Co., , ¶ 15, 730. 102

Appendix G

Sunray DX Oil Co. v. Brown, 477 P.2d 67, 70 (Okla. 1970) 115

Sunray DX Oil Co. v. Brown, Okl., 477 P.2d 67 (1970) 102

Thompson v. Presbyterian Hosp., Inc., 652 P.2d 260, 263 (Okla.1982 136

Tulsa Fruit Co. v. Lucas, 208 Okla. 166, 170-71, 254 P.2d 788, 792-93 (1953) 118

Union Bank of Tuscon v. Griffin, (Okla. 1989) 113

US v Garrett 10th circuit, Robinson v US, US v Kahn 118

Verschoor v. Mountain West Farm Bureau Mutual Insurance Company, 907 P.2d 1293, 1299 (Wyo.1995). 110

Winemiller et al. v. Lorton, 121 Okla, 99, 249 P 406 138

Statutes

Okla 15 O.S. 266 123

Oklahoma Constitution - Article 14 § 2 121

Oklahoma Constitution - Article 14 § 3 122

Restatement of Torts Section 552 108

Other Authorities

Prosser, Handbook of the Law of Torts § 93 at 622 (4th ed. 1971)) 114

Prosser, Law on Torts [3d ed. 1964] at pp. 332-333 114

Appendix G

Restatement (Second) of Torts, supra, § 551 at 119 106

Sec. 21, p. 662, 38 Am.Jur 112

Rules

27A Fed. Proc.L.Ed. § 62:50 121

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDY KNIGHT and PHOENIX CENTRAL, INC.,

Appellant/Defendants/Counter Claimants,

Vs. Case No. 09-6075

MOORING CAPITAL FUND, LLC and

MOORING FINANCIAL CORP,

Appellee/ Plaintiff

Appendix G

APPELLANT'S OPENING BRIEF

Appellant Judy Knight("Knight") submits the following opening brief in the above-referenced case against Appellees/ Mooring Capital Fund, LLC (Capital) and Mooring Financial Corp.(Financial) (collectively "Mooring") and respectfully requests that this Court reverse the trial court's Order granting summary judgment in favor of Appellee. In support of the appeal, Appellant further states as follows:

JURISDICTIONAL STATEMENT

(A) The district court had original jurisdiction of the action below pursuant to 28 U.S.C. §1332 since this action is based on diversity of parties and amount in controversy exceeds $75,000.

(B) The tenth circuit court of appeals has jurisdiction of this action pursuant to 28 U.S.C. §1291 since the district court has entered a final decision.

(C) The Notice of Appeal for both Phoenix Central, Inc. and Judy Knight was filed on April 10, 2009.

(D) A judgment on the jury trial was entered on March 12, 2009. An order on the award of attorney fees was entered on June 8, 2009. Appellant Judy Knight filed a Motion for Reconsideration on the attorney fees against her order pursuant to F.R.C.P.

59 on June 18, 2009. The district court denied the motion for reconsideration on the attorney fees order on July 8, 2009.

STATEMENT OF ISSUES AND THE CASE

At its core, this case is about the improper actions of Mooring and the misplaced credence the trial court gave Moorings' testimony in opposition to Appellants' evidence and testimony. Knight contends that the trial court has made several fundamental errors in its decisions that produced its order on summary judgment and that several errors were also apparent in the admission and denial of evidence and claims not permitted that unfairly prejudiced the case.

Also at issue on appeal is whether the trial court applied the correct standard when determining whether the injured party has proven a question of fact regarding pretext. In other words, whether the trial court should decide an inference in favor of Mooring if Knight has proven that the stated reasons for the actions by Mooring and other contentions asserted by Mooring are unworthy of belief.

There is also an issue as to whether the evidence in the record is sufficient to establish questions of fact that should have been presented for the jury to decide on several issues.

The trial court also refused to consider several claims based in law that were proven by the Appellants.

Additionally, there is an issue as to whether the trial courts' exclusion of evidence unduly prejudiced

the Apellants' cases, thereby causing a manifest injustice to those parties.

And whether the trial court erred in excluding the testimony of the Appellants' expert witness and of Knight's testimony.

By its orders the trial court resolved that Knight could not maintain a prima facie case, could not show a causal connection, and could not establish a factual question on pretext

STATEMENT OF FACTS

This is a case that should be fairly simple, and has been made overly complicated by vexatious and bad faith arguments and contentions during the proceedings by Mooring that had no basis in either fact or law resulting in litigation that has lasted more than 3 years

The transaction that provided the basis for the wrongful acts of Appellees arose from Capital's purchase of a Note and Mortgage collateralized by a shopping center titled in the name of Phoenix Central, Inc. (Phoenix), a wholly owned corporation of Knight. Knight and Phoenix/Appellants were the makers on the Note which originated in 1992 with Central Bank of Oklahoma City. Bank One became the holder through its purchase of Central Bank, and later Bank One sold the instruments to Mooring Capital Fund, LLC as part of a loan pool on/or about July 25, 2002. Mooring Financial Corp is the servicing agent for Capital.

At the time Capital purchased the loan pool, Bank

One had advised Mooring that the balance remaining was $ 316,040.12, comprised of $288,433.80 principal plus accrued interest of $27,606.32. Aplt's Sup. at 519,661-671,871. At all times previous to August 16, 2007, Mooring concealed its possession of that document and the legally collectible amount, and further did not use that amount in any of their recalculations of the loan history, even after admitting its existence. Aplt's Sup. at 1023.

Knight received the first monthly statement of account (billing) from Mooring during October, 2002. By that time Mooring had received at least $15,000.00 in note payments from appellants. However, the statement proclaimed that the remaining balance was $391,421.28. Aplt's Apx 667,Aplt's Sup. at 815; 1023.

As more fully discussed below, from the time that Capital purchased the Note, Appellants have, individually and through Counsel, repeatedly lodged complaints with Mooring as to the overstatements and additionally requested documents and computations that would support the demanded amounts. For the most part those requests were repeatedly and continuously ignored, Mooring denied having the documents requested and any information finally furnished[1] was incomplete, incomprehensible and unresponsive

Appellants wished to refinance the Center to obtain additional proceeds required to consolidate debts, reduce interest, make renovations and repairs to

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[1] Oct, 2003, Dec, 2004, Feb, 2005

property, and to .otherwise further Appellants' profit objectives. (Page 3) Aplt's Sup. at 507,929; Aplt's Apx 604,418:283.

As a result of Moorings' failures to adjust the claimed balance to a true and correct amount, Appellants were denied the ability to obtain a release of the collateral by paying the note in full for only the legitimate amount owed and obtain those additional funds. This failure injured Appellants in the form of ongoing costs that would have been eliminated, additional expenses that would not have been incurred and delayed or lost earnings that would have been facilitated by the loan proceeds.

Appellants' last payment on the Note was in February, 2005. Capital filed for Foreclosure in September, 2005 claiming $363,592.28 (State court Petition Doc 1- 3 Aplt's Sup. at 864,.. Knight filed claims in May, 2007. Knight's Second Amended Complaint was filed in July, 2008 and that case was consolidated with the Phoenix case Jan 30, 2008. (Order-Doc 206) Knight was designated as defendant thereafter, although Mooring filed no complaints against her. The note was fully paid in November 3, 2008, in accordance with Moorings recomputed loan schedule. Capital dismissed its claims on Jan 13, 2009 with a reservation for an award of fees according to the contract. Aplt's Sup. at 340. At that time Appellants became Plaintiffs, however, all documents filed continued with the designation as defendants to avoid confusion.

Due to the connected issues and inferences during

the litigation, this brief contains references to the Phoenix case since its inception to enable a complete picture and factual presentation of the events and results. See Phoenix Central Inc First Brief for additional details on filings and for references to the preservation of issues and appendix references. Mooring repeatedly argued they relied on incorrect information in arriving at the demanded amounts, that their misplaced reliance was Bank One's fault, that Knight and, during the trial, even that potential lenders should have forced them (by what means was unstated) to determine the correct amount due. Mooring argued that the overstatement had been caused by applying an incorrect interest rate and that they were unaware of some payments made to Bank One. The argument as to lack of knowledge of payments prior to the purchase date is irrelevant and such was admitted by Mooring on Dec 3, 2007. Aplt's Sup. at 225. The claim that the overstatement was caused by using an incorrect rate of 9.75% is easily disputed by the facts, proven merely by preparing schedules using the alleged "faulty" data.[2] Aplt's Sup. at 673, 678.

The facts show that those arguments arose only after the litigation and infer were invented in an

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[2] Appellees also admitted that the amount of interest "thought to be" originally entered in their system was 8 25% as was reflected on the monthly statements (Page 28)[83a]

attempt to legitimize the previously demanded balances.

The concept that Capital purchased the loan without knowing how much it could legally collect is absurd. What prudent entity would buy an interest in money to be received over time without knowing the expected return? That is, unless, the only real purpose in purchasing the mortgage was to ultimately seize the underlying property at a bargain price through foreclosure? Which then begs the answer, how could one be reasonably certain to achieve that result, except through deceit such as that which has been practiced in this case?

The determination of an amount due that was considered to be a reasonable representation[3] of the legal balance owed, per Moorings' recalculation, was not made until 2007, more that 1 year post-litigation and nearly 5 years after it purchased the note.

SUMMARY OF ARGUMENT

The standard on summary judgment makes it very clear that this Court must disregard all evidence in favor of the moving party and give credence to the evidence presented by the nonmoving party. The trial court failed to do this and thus based its decisions on untruths and a distorted and skewed version of the

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[3] Mooring never adjusted the claimed balance to a computation beginning with the finally admitted true balance bargained for, thereby overcharging Knight approximately $5,000.

facts leading to an incorrect application of the law (Page 11)[90a]

The trial court also erred in finding that Appellant had not proven a factual issue regarding pretext on Moorings' stated reasons for Moorings' breach.. There are several issues of fact calling into question the true reasons for Moorings bad acts and omissions, but the trial court discounted these reasons and applied a more strict standard for Appellant to show at the summary judgment stage in order to create a question of fact on pretext. (Page 11)[99a] The law simply requires Appellant to show that the stated reasons for Moorings' actions were unworthy of belief, and it is up to the factfinder then to determine whether intent and/or negligence can be inferred. (Page 25)[118a]

The undisputed facts resolve whether the Appellants' had any power sufficient to correct Moorings' deficiencies, other than asking for the Court's relief, and whether Mooring had total control of the release of the property for the amounts it demanded and therefore held Phoenix and Knight hostage to their demands. Aplt's Sup. at 333-#25.

The trial court misinterpreted the basis for the damages claimed by Knight and thereby denied her right to present such injuries to the jury. (Page 52)[137a]

The trial court erred in dismissing Knight's' claims for usury, conversion, unjust enrichment (Page 38)[119a], claims to be determined as a matter of law, when it had discretion and the duty to consider all viable claims and alternate theories

Appendix G

A question also remains as to whether the fees incurred in the litigation are properly an element of the damages suffered in order to obtain the true balance which in turn would permit the Appellants' to pursue the projects and mitigate the damages being suffered. (See Phoenix Central Inc First Brief)

Finally, a question remains as to whether Knight has shown that the damages she suffered were objectively pervasive and severe to support the dismissed claim for emotional distress.

The issues were preserved for appeal in Responses to Motions in Limine and Final Pretrial Report See Appellant Phoenix Principal Brief and Aplt's Apx at 397,343,110,97,94,86,435 and Aplt's Sup. at 260, 310

To avoid duplication Knight incorporates the Appellant Phoenix Central, Inc.s' Principal Brief and accompanying Appendix into this Brief for inclusion of additional fact details, arguments, identification of preservation of the issues and references to the Appellants Appendix.

ARGUMENTS

Proposition I.

STANDARD OF REVIEW

Review of the district court's grant of summary judgment by this court is de novo, applying the same legal standard used by the district court. McKenzie v. Dovala, 242 F.3d 967 (l0th Cir. 2001). This Court reviews the issue stated herein de novo, not only

because it was decided by the district court in the context of a motion for summary judgment4 but also because it involves questions of law.5 Quigley v. Rosenthal, 327 F.3d 1044, 1057-58 (10th Cir. 2003).

In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133,120 S.Ct. 2097, 2110 (2000) the Supreme Court made it clear that a court must disregard all evidence favorable to the moving party and give credence to the evidence favoring the nonmovant.

Therefore, Phoenix/Knight's version of the disputed facts is assumed to be correct. Conner v. Shnuckets, Inc., 121 F.3d 1390,1392 n.2 (10th Cir.1997).

In other words, the evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to that party. Reeves, 120 S.Ct. at 2101; Simms v.

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[4]See *Tax & Accounting software Corp. v. United States, 301 F.3d 1254, 1257 (10th Cir. 2002* (discussing standard of review applicable to district court decisions granting or denying motions for summary judgment.)

[5] See R*osette, Inc. v. United States, 277F.3d 1222, 1226 (10th cir. 2002)* ("The construction and applicability of a federal statute is a question of law, which we review de novo ") (citation omitted), see also generally *Salve Regina College v. Russell, 499 U.S.* 225,231,113 L,Ed, 2d 190, 111 S. Ct. 1217 (1991) (discussing standard of review for questions of law)

Oklahoma, i6 F.3d 1321 (10th Cir. 1999), cert. denied, 120 S.Ct. 53 (1999).

Finally, summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact. Randle v. City of Aurora, 69 F.3d 441, 453 (10th Cir. 1995). "[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Id. at 453. Knight contends that while the trial court failed to follow several of these edicts, once this Court reviews the facts de novo, it will find that the granting of summary judgment was improper.

Proposition II.

APPELLANT HAS CREATED A QUESTION OF FACT AS TO WHETHER MOORING' REASONS FOR ITS' BAD ACTS ARE UNWORTHY OF BELIEF

a Mooring has continually presented arguments that have no basis in fact or in law.

1. On January 7, 1998, Bank One declared default when the December 15, 1997, payment was not paid on time.[6] Judgment was unopposed and was granted in July, 1998.

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[6] It was later determined from documents provided by Mooring that Bank One had started procedures to sell the note prior to December 15

Appendix G

2. In October, 1998, Knight had paid Bank One $100,000 to forestall a sheriff's sale of the property. That payment paid off all accrued interest and reduced the principal balance to $288,433.60. Aplt's sup 739,806. In March, 1999, Phoenix filed a Chapter 11 Plan to stop a scheduled sheriff's sale of the Center. It is undisputed that two Fourth Amended Plans were filed, and that the 2nd (sic) Fourth Amended Plan was confirmed on 2/28/01. Aplt's Sup. at 465. The terms of the Confirmed Plan were payments of $5,000 per month on the 28th with interest at prime + 2% as opposed to a rate of 9.75% fixed in the unconfirmed Fourth Amended Plan. Aplt's Sup. at 562, 805 $85,000 was paid to Bank One on the Note between the confirmation date and Capital's acquisition of it. Aplt's Sup. at 668-670.

3. Mooring had full knowledge that a Chapter 11 had previously been filed, of the proper interest rate, and an idea of the balance owed prior to making an offer to purchase it. Aplt's Sup. at 487, 1011,1014,1026,1043

4. The Chapter 11 Plan had no relevance to the determination of the balance on the Note in Moorings' hands unless it could be proven that Bank One had furnished Mooring with a balance that (calculated backwards in time) would have exceeded the Plan's allowed claim. Aplt's Sup. at 1027.

5. Bank One informed Knight it had sent its entire file to Mooring shortly after the sale of the Note.

Mooring has now admitted this by its eventual production of those records and by deposition. Aplt's Sup. at 813, 1020-1023,1026,1027.. However, Mooring repeatedly claimed they did not have those records. It is notable that their activity log never states the non-existence of those records when it refers to Knight's requests for them. Aplt's Apx. at 676 Pg 19-22.Aplt's Sup at 581, 828. Mooring offered varying excuses for not furnishing the requested information that ranged from not having them to claiming they were on their way [Note: they never arrived] Aplt's Sup. at 558 There is no apparent statement in the record that the court recognizes Moorings' deficiencies in this area, although it criticizes the Appellant for far less discovery shortcomings.

6. The correct interpretation is, as Nalls testified, that if no records were received after his hire date, and yet during litigation, Mooring finally provided about 1000 documents from those files, such files must have been in Moorings' possession in 2002 and at all times they were maintaining they had no such documents. Aplt's Apx. at 441 Pg 7, Aplt's Sup. at 1027 and Transcript at 471:24-473:7

7. Since Mooring refused to furnish information or documents to Appellants, Knight could not determine whether the overstatements were caused by Bank One or Mooring. Nevertheless, the Court stated that Knight was at fault for not telling Mooring why their demands were overstated. Aplt's Apx at 14 and Aplt's Sup. at 806, 808.

Appendix G

(Order 363 Page 9-10)

8. Moorings' activity log shows only 3 occasions of acknowledgment of Appellant's complaints (Page 1 above) None of these responses included a loan history schedule. The information provided was incomplete and incomprehensible as an explanation in support of the balances that had been demanded. Aplt's Apx at 707, Aplt's Sup. at 465, 526.

9. Phoenix Doc 133 recaps Moorings balance claims as of April 8, 2005, during litigation as follows. "Since the inception of this lawsuit the alleged payoff balance asserted by Mooring has changed no less than three times. [, Petition filed September 21, 2005, alleged debt amount is $363,592.26; First Amended Complaint, filed July 11, 2006, alleged debt amount is $271,653.73; and Mooring's Motion for Summary Judgment, para. 11, alleged debt amount is $214,777.41....There has been no additional information provided to Mooring that it did not have access to pre-litigation. These changes in the amount due evidence Mooring's negligent accounting practices" (Doc 133 Page 33)

10. Mooring maintained they had responded numerous times and spoke with Knight requesting data. Pre litigation, Knight had only spoken to Nalls on two occasions in Dec, 2004 and she initiated the contact. (Nalls deposition) Jacquemin, the President of Financial stated "We have dozens and dozens and dozens of communications recorded in writing, on the phone trying to reach the right

balance, right numbers" Aplt's Sup. at 810,819,850,994. .....yet Mooring furnish[e]s no proof of that and their own log disputes it

11. Knight and her counsel had informed Mooring on at least two occasions of the amounts they estimated were owed. The first occurrence was evidenced by contemporaneous writing. Aplt's Sup. at 489, 813. Mooring disputes this evidence when it suits them but when it seemed to be a benefit acknowledged it. Aplt's Sup. at 226 ¶ 3. Mooring never asked Knight for any loan calculations therefore none were provided. The trial court however, ignored Knight's evidence and accepted Moorings' contentions. Aplt's Apx at 22. On request of Phoenix, the parties' counsels met in January, 2006, to compare schedules in an effort to determine the differences. Aplt's Sup. at 224 Line 9-10. Appellants refused to sign a waiver that the schedules would never be presented or referred to outside that meeting. The schedule provided by Mooring did not agree with any balances previously claimed by Mooring and began, not at the date of purchase of the note with the balance then owed and for which Mooring bargained, but with calculations prior to the Chapter 11 filing. Aplt's Sup. at 671-677.and Doc 129-02-Loan Schedules.

12 Knight's schedule also began prior to the Chapter 11 filing and was computed in accordance with Bank One billings for those periods and the Plan provisions. Bank Ones' later records were not available either from Bank One or Mooring.

Therefore, unlike Mooring, she had no other information with which to prepare the calculations Aplt's Sup. at 519, 873 (Trial Exhibit 109)

13. Mooring's schedule did not include $20,000 of payments paid to Bank One. On that same day Mooring submitted two additional schedules and included $15,000 of the payments that were not on the first schedule. Mooring makes a point that they immediately applied $15,000 to their schedule as though that was a concession rather than an obligation. Aplt's Sup. at 675, 737,1043.Loan Schedule Comparison Doc 353-14 and Item10 above.

14. Although factually incorrect, Mooring maintained throughout the litigation that its' reliance on an incorrect rate of interest and its lack of knowledge of the above referred to payments were the sole cause of the overstatements as more fully discussed herein. Some Examples,:Aplt's Sup. at 96, 106, 111,118,216,223-226,1011, 1031, Contrary to the evidence, trial testimony given by Mooring disputing itself, the Court's Order to Vacate (Aplt's Sup. at 236) and logic, the court after trial still gave credence to the arguments. when it stated "However, it is true that Mooring's confusion was due, in part, to confusion in the naming of documents filed by Phoenix in its bankruptcy." Aplt's Apx. at 22

15. At best, those arguments presented may be deemed to explain Moorings' confusion as to the incorrect loan calculations post litigation, they do nothing to

explain or forgive Moorings' negligence prior to 2006. Aplt's Apx at 814, 835.

16. Mooring claims they prepared multiple schedules trying to satisfy Knight. Aplt's Sup. at 1029.This is just false. First they have provided no such proof of those numerous calculations, secondly, there was never any request by Knight to make any computations other according to the terms of thenote. The only disagreement between the parties, as to the balance recalculated by Mooring, in Jan. 2007, was the method of applying payments to interest which was resolved by Court order. Aplt's Apx. at 568

17. Mooring states "Upon learning it had the wrong Fourth Amended Plan, Mooring moved away from its internal FAS accounting system and started using Excel spreadsheets in an effort to recreate the loan history from the correct version of Phoenix's confirmed plan forward. Aplt's Sup. at 1028. and Reply Doc 133.

18. Trial testimony by Jacquemin claimed that the FAS internal accounting system was not used as soon as an attorney was involved, ie. 2003. that the accounting was done on a spreadsheet. Aplt's Sup. at 1028. Transcript 471:24-473:7. However, Knight received default letters generated by the system during this new period. This new claim is in direct conflict with other testimony previously given. A reasonable man could infer from this new assertion is to stretch their "wrong plan excuse" to periods preceding 2006.

19. During trial Financial's President was asked "Do you know whether you corrected the amount owed..... when filing the initial petition in Sept, 2005?". The testimony was they had Nalls "...prepare spreadsheets saying, okay, plug in the font (sic) right here, take it back to 1999, and plug in all the variations we can think of to come up with the balance-a balance that the borrower may agree with.." Aplt's Sup. at 1029. (See Transcript 378:9-381:3 for entire quote) It is possible the answer was not in context with the time period of the question. Still this testimony is flawed. If before the filing date, the inference is to attempt to support the overstated amounts. Nalls deposition testimony was that he went to Racer and retrieved the confirmed Plan in readiness for the foreclosure suit. . (Transcript 471:24-473:7) If this pertains to a time after Dec, 2005 they had Knight's schedules for comparison so the remaining testimony is false.

20. At trial, Mooring again switched theories and offered yet another explanation, unsupported, as the cause of the overstatement. That testimony does not comport with other testimony or arguments, nor does it ring with the sound of truth, logic or even plain arithmetic.[7] Aplt's Sup. at

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[7] Knight, having no information from Bank One as to how they applied payments post confirmation believed that the course of dealing pre petition was appropriate and had therefore computed her schedule on that basis (See Trial Exhibit 109)

1037.

21. These new theories of errors only serve to highlight Moorings continuing efforts at deception. Nevertheless, even if any are accepted as truth, none are relevant to negligence acts claimed by Knight.

22. Broker testimony stated that Knight had not authorized him to obtain the balance from Mooring. Mooring's submission of their alleged payoff balance including Mooring's fax number effectively disputes this Aplt's Sup. at 508-513, 842, 959. (Mooring continued to argue that no such information was provided. Further Mooring misrepresented Judah's statement claiming he said that Knight stopped him from contacting Mooring for the purpose of forcing them to correct the balance. Aplt's Sup at 800 No such statement exists. The Broker's testimony was also that Knight had not furnished any information to process the loan, however Knight's submission of e-mails prove differently Aplt's Sup. at 494-508,651-657, 800,848 851, ,959 and Aplt's Apx at 666 . Judah falsely stated that he had advised Knight that she could escrow the overcharge. Although Mooring changed their assertions, and stipulated the loan was approved, they submitted the Brokers testimony by deposition to the jury, tantamount to suborning perjury.

23. Mooring claims Appellants furnished NO computation of damages when a minimum of 5 sets (updated) had been furnished.. (See Various

Exhibit Lists Docs and Aplt's Sup. at 586-650, 689-720.) Additionally, Mooring's pleadings complain of the complexity of such schedules

24. Mooring also claims they had no documents in support of damages. Evidence furnished has been furnished or detailed in/with various pleadings and by counsel at the pre-trial hearing.. (Most recent claim Aplt's Sup. at 770.) Moorings'counsels inefficiency in knowing what documents they have been furnished and their inadequacy in performing accurate analysis of these should not be ascribed to Knight. Additional time for deposition has been offered to assist or explain twice, however, Mooring choose not to accept that offer

25. Mooring complained in 2009 of surprise about Salon and Spa, when it also complained about that inclusion in 2007 Aplt's Sup. at 200, 992.

26. At various times Mooring complained that they had NO and/or inadequate or understandable computations of damages; of supporting documents; and of financial records. At other times, they complained that those schedules and documents were too voluminous, too complicated, or irrelevant They also claimed accounting records were not contemporaneously entered and at the same time that they could not compare certain schedules since it had been updated to the current month. Aplt's Sup. at 777, 781, 1054.. Mooring demanded information not being claimed as damages while discarding relevant items..The court sided with Mooring. In one instance, calling

the print outs the financial records "a trial equivalent of a document dump" Aplt's Sup. at 782, 925, 1058. and ultimately denied Knight's ability to testify as to her damages.

27. Mooring deceived its' own CPA. The affirmative confirmations sent to Appellants on behalf of Capital's CPA incorrectly reported the balance as $288,433.60 and the rate to be 8.25% for every year from 2002 through 2006. Aplt's Sup. at 493, 525. The CPA failed to properly provide the information requested per the Subpoena Duces Tecum.

28. The failure to make corrections on the accounting records or to inform the auditors of the problem would necessarily generate incorrect reports to the investors in Capital as well as its lender bank. Aplt's Sup. at 1038.

29. Mooring deceived its lender Bank and two Courts of Oklahoma. Capital assigned all of its right, title and interest in the mortgage to United Bank on a line of credit from Dec, 2002, through Dec, 2006 Aplt's Sup. at 463, 524, 864, 1034, 1035, 1040.. United Bank provided limited information in response to its' subpoena, however, it did provide information that showed Appellants' loan was still listed as pledged in October and November, 2008, when the Note was fully paid on November 3, 2008.

These and others below are only some of the examples of Mooring's false and misrepresented statements

Knight contends that the only logical inferences

that can be drawn from these devious contentions are either that Mooring, being well aware of their intentional acts and omissions and its success in concealing the true facts prior to litigation, believed it could continue to hide the truth through a whirlwind of bombast and/or that its' actions would draw out the litigation and increase the cost beyond the ability of Appellants to pursue it to conclusion or that the justice system is totally blind and easily manipulated or that the Mooring parties and employees, together with their Counsel, are incompetent to the extent that goes beyond stupid.

a. Mooring admitted that its arguments in defense of counterclaims had no relevance to the facts.

Various orders of the trial court demonstrate the effectiveness of Moorings' contentions throughout the proceedings in influencing the Court's decision with untrue information insofar as they very nearly echo the words in Moorings' pleadings: (See Aplt's Apx at 484, 435 and Aplt's Sup. at 223 for one example comparison of recitations)

On August 15, 2007, Mooring admitted its possession of and produced the document that was the most material evidence that Mooring knew, or should have known, that its demands for payment on the Note were more than the amount that could be legally claimed. Aplt's Apx. at 441 This document not only provided written evidence that Mooring had that

information, but confirmed the logical inference that the information was within its knowledge.8

On December 3, 2007, Mooring admitted that all the arguments and reasons that it had presented to the Court in furtherance of excusing its bad acts were not appropriate or relevant to explain the improper demands of amounts not legally owed. (Aplt's Sup 223. Response Doc 189 Pg 4)

It is notable that Mooring states. "It's assumed that Mooring had been relying on wrong fourth amended Plan throughout its ownership of the Phoenix loan." (Page 5) And in the same document states on Page 6 "Mooring's accounting software indicates that Mooring was accruing interest on the loan at a rate of 8.25%) Mooring does not know whether the loan was set up wrong originally, or whether the rate was changed to 8.25% at some later time Aplt's Sup. 224.

Document 189 Filed 12/03/2007 Page 5 of 11

The Court on March 8, 2008, (Order Doc # 214) vacated its previous orders that had been based on Moorings' misrepresentation of the facts, stating

"On the eve of trial, Mooring apparently located and turned over additional discovery which, viewed in the light most favorable to Phoenix, suggests Mooring knew or should have known of the actual loan payoff

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[8] *The fact the loan number in the record is the one assigned to the account in Moorings' internal records raises the question as to whether this is not evidence they knew this was the proper information to enter.*

and interest rate at the various times it was quoting or seeking a different payoff from Phoenix" Aplt's Apx 435 or Aplt's Sup 236.

"By contrast, the additional documents produced by Mooring and now relied on by phoenix as to what Mooring knew or should have known as to the proper amount due, the applicable interest rates and the like are sufficient, viewing them in the light most favorable to Phoenix, to create a justiciable issue as to whether Mooring's conduct was knowingly, intentionally or recklessly wrongful so as to afford a potential basis for recovery on some or all of Phoenix's counterclaims.1 As a result, the court concludes its summary judgment order should be vacated as to Phoenix's counterclaims"

Proposition III.

THE TRIAL COURT ERRED IN NOT PRESENTING NEGLIGENCE TO THE JURY WHEN APPELANTS HAVE PROVEN A PRIMA FACIE CASE OF NEGLIGENCE

See Appellant Phoenix Central, Inc.s' Principal Brief as though pled herein.

Ruling - (Negligence Transcript 6:1-7:8)

Moorings actions in claiming overstated amounts and in neglecting to investigate the complaints which should have resulted in the correction to the overstatements and in suppressing the facts of the balance owing at the time Mooring bargained for and

purchased the Note were of such a nature as to give rise to an inference that these actions had been taken recklessly and in wanton disregard of Phoenix' rights.

Coe v. Esau, 377 P.2d 815, 820 (Okla. 1963) observed that a prima facie case for negligence is made where the circumstances are such as to remove the case from the realm of conjecture and place it within the sphere of legitimate and rational inference

Because the trial court has the limited role of determining whether there are any such issues of fact, it may not determine fact issues on a motion for summary judgment; it may not weigh evidence. Stuckey v. Young Exploration Co., , ¶ 15, 730.

Issues of negligence cannot ordinarily be determined during the consideration of a motion for summary judgment because the presence or absence of negligence often remains a question of fact. Stuckey, , ¶ 7, at 729. If a reasonable person might reach a different conclusion from the facts than that suggested by the motion for summary judgment, granting summary judgment would be improper. Hargrave v. Canadian Valley Elec. Co-op., , ¶ 14, 55. Circumstantial evidence may also be presented to successfully oppose a motion for summary judgment. Manora v. Watts Regulator Co., , ¶ 10, 1058.

Appendix G

The Oklahoma Pleading Code does not require a plaintiff to set out in detail the facts upon which the claim is based. Niemeyer at 1320. It merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief. The facts alleged, if proven, would establish a prima facie case of intentional tort or negligence per se. Delbrel, Bettis v Brown

1. Mooring's failures to answer Appellants' complaints and requests for documentation, investigation and correction or explanation demonstrates the lack of even a minimum of care Aplt's Sup. at 1027
2. Mooring's activity log includes 10 or more references to Appellant's complaints and requests for documents during a 15 month period Aplt's Apx at 676, 112 Line 1-2.
3. Mooring's activity log does not begin until October, 2003 and entries after December, 2004 were redacted. Aplt's Apx. at 676, 1028.
4. Knight/Phoenix has submitted written evidence of notices furnished to Mooring on 5 occasions between August, 2002 and September, 2003 to which NO response was made. Aplt's Apx at 676, Aplt's Sup. at 492,548,1026.
5. Appellant's attorney that was hired in October, 2003, was unable to obtain the requested information despite numerous requests over the

next 14 months. During this period Knight ' had no direct communication with Mooring despite Mooring's representations otherwise and Mooring offered no proof of such claimed communications.

6. The October and November, 2003, statements had been adjusted down by about $140,000 to $160,000 Then Appellee discontinued sending monthly statements with no explanation. Thereafter, the only way Knight knew the balance being claimed was when a payoff balance was requested.

7. The publishing of incorrect payoff balances, was in reckless disregard of the consequences to Knight. Because Mooring had knowledge of the disputes with no notations that they had been investigated or resolved, Mooring had no reason to believe the truth or falsity of the published amounts. Aplt's Apx. 676.

8. Even if an action can be excused a simple mistake, whether it be an act or omission, it is clear that the re-occurrence of the claimed "mistake" identical in all respects, each to the other, over and over again, for an extended period of time, in this case being more than 4 years most certainly meets the minimum definition of negligence and propels the substandard or concealed actions into gross negligence, at best, or to fraud, in the alternative.

9. Moorings' own records reflect that 8.25% was the interest rate entered on their books Appellants maintain that even a minimum of care would have disclosed that the interest rate of 8.25% being

charged was incorrect The discovery of that fact, logically, would have caused, at least, a correction and/or some dialogue and, at most, further investigation that would disclose the totality of the overstatements.. The least offensive charge against Mooring would then be that no such investigation was undertaken. The greater charge of intentional failure to correct the account can be inferred that if an investigation was undertaken, the overcharge in the initial balances entered was also found and it was determined that continued avoidance of answering would be a better route. Aplt's Apx 667-702.

10. Mooring asserted during trial that the proffering of a loan schedule (Doc 109) in Jan, 2006 was "long after the suit was filed." Aplt's Sup. at 519,958. They see no problem or delay in Mooring not correcting their claimed balances for a period of nearly five years.

There can be no question that all power to control or alter the claimed balances were within the sole discretion of Mooring. Aplt's Sup. at 333 and,Pre Trial Report Doc 313 page 18)

Even after litigation, and comparison with Knight's calculations, Mooring did not make appropriate corrections until April, 2007 and those corrections were to a recalculated loan history, ignoring any explanation or schedule supporting amounts demanded between 2002 and 2006. To date Mooring has not provided any schedule that agrees with those historically demanded amounts which might reveal

their real intentions. They have however, testified that they recalculated the loan using various scenarios. Aplt's Sup. at 1028 and Transcript 430:1-433- One wonders why such procedures would be undertaken except to develop what might be deemed to be a reasonable excuse for illegal activities, There is only one way to compute the correct balance.

The greater weight of the evidence is that Mooring either negligently or intentionally and fraudulently overstated the amounts due.

c. The Court erred when it dismissed the claims of Negligent Non Disclosure and Negligent Misrepresentation and there is a question whether the court appropriately dismissed the claims of Mini Malls of America

Restatement (Second) of Torts, supra, § 551 at 119 reads as follows:

> *(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same*

liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and [Emphasis Added]

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Appendix G

a A duty is not required under negligent misrepresentation to give rise to a cause of action.

Restatement of Torts Section 552(1) states: One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

In relevant part, § 552(2) limits liability to loss suffered "by the person or one of a limited group of persons for whose benefit and guidance" the information is intended to be supplied. Comment © to § 552 states that the rule applies only when the defendant has a pecuniary interest in the transaction in which the information is given.

Comment (d) states that this interest "will normally lie in a consideration paid to him for it Commercial Financial Services, Inc. V. Arthur Andersen LLP 2004 Ok Civ App 56 94 p.3

Indisputably, Mooring Financial was paid a fee by Capital to manage collections and maintenance of the account and Capital received income in the form of interest.

As previously explained, the pay off amounts were provided for the benefit of Knight as well as Phoenix.

Unquestionably, Mooring and Mooring Financial intended the pay off amounts to reach and influence Knight and her agents. The payoff amounts were made at the behest of Knight, individually and through agents whom she authorized to obtain them. Mooring had a duty under the note to provide such information in a timely manner when requested to do so by any authorized party. Such authority is given under the Fair Debt Collection Act as well as the UCC liability act and the common law.

We cannot accept the argument that Knight, who was ultimately liable for payment of the debt and would require that information in order to obtain a release of the collateral, would be excluded from the Restatement's coverage.

> *In fact, the Restatement itself resolves this argument. Comment (h) to § 552 states, in relevant part: "It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it."*

Further, it cannot be asserted that Knight would not incur damage either by Moorings' wrongful holding of the property or by Mooring collecting amounts above that legally owed to effect a release of the collateral nor that Mooring could not possibly have known or even imagined those consequences.

Appendix G

In notices issued by Mooring, Knight in her individual capacity and in her capacity as the President of Phoenix were not differentiated. . It has also been established that Knight is a party to the contract. It is absurd to think that any injury from a misrepresentation by Mooring would only flow back to Phoenix, whenever both were parties to the same contract. Equally absurd, is a belief that Knight was not entitled to benefit from the available equity in the property. Of consequence is that the communications were made, or not made, to Knight and, as a result her personal finances, as well as Mini Malls, were impacted (Doc x)

> *Hulse v. First American Title Company of Crook County, 2001 WY 95, ¶ 52, 33 P.3d 122, ¶ 52 (Wyo.2001) (quoting Richey v. Patrick, 904 P.2d 798, 802 (Wyo.1995). A fundamental difference between the two causes of action is, a plaintiff need only prove negligent misrepresentation by a preponderance of the evidence, not unlike any other plaintiff in any other action sounding in negligence, while a plaintiff must prove intentional misrepresentation by clear and convincing evidence. Verschoor v. Mountain West Farm Bureau Mutual Insurance Company, 907 P.2d 1293, 1299 (Wyo.1995).*

Mooring admits it owes Appellants a duty of care to properly. Aplt's Sup. 1030.

Mooring's effort to avoid responsibility for its failure to provide the information that would have entirely avoided this litigation cannot be rewarded by

claiming a borrower could and should not rely or have confidence in the balances claimed owed as published by Mooring.

A fiduciary relationship springs from an attitude of trust and confidence and is based on some form of agreement, either expressed or implied, from which it can be said the minds have been met to create a mutual obligation. Lowrance v. Patton, 1985, OK 95, ¶ 17, 18,710 P.2d 111-12.

The term "fiduciary relationship" is a very broad term and has been applied in circumstances where influence has been acquired and abused and where confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The question is whether a relation in fact exists. Sellers v. Sellers, 1967 OK 34, ¶¶21, 22, 428 P.2d 230 , 236.

With respect to the existence of a special relationship, guarantor's next contention, focusing on the evolving and unique nature of the relationship between banks and society at large, is that the traditional debtor-creditor relationship is changing to that of fiduciary-beneficiary. In supporting his proposition that a special relationship exists between a bank and its customer, guarantor cites Djowharzadeh v. City Natl. Bank & Trust Co

"The question as to whether a fiduciary relationship existed is to be determined wholly upon the record facts herein. The courts have

generally refrained from defining the particular instances of fiduciary relationship in such manner that other and new cases might be excluded. The expression 'fiduciary relationship' is one of broad meaning, including both technical relations and those informal relations which exist whenever one man trusts and relies upon another. Reeves v. Crum, 97 Okl. 293, 225 P. 177.

It is stated in Sec. 21, p. 662, 38 Am.Jur. that "it frequently has been declared to be a rule that no cause of action in tort can arise from the breach of a duty existing by virtue of contract, unless there is between the defendant and the person injured what is termed 'privity of contract'." In the concluding portion of the section it is stated that "no privity of contract is essential to support liability for negligence in respect of acts or instrumentalities which are imminently dangerous. The liability in such instances is independent of privity of contract and depends merely on the duty of every man to act so as not to injure the persons or property of others."

Accompanying every contract is a common-law duty to perform it with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract. Thus, liability for negligent breach of a contract with a third party is not necessarily dependent upon a pre-existing privity in legal

relationship between the person injured and the person causing the injury. Keel v Anderson

The creditor's duty to the guarantor is to refrain from misrepresentation and fraudulent concealment and to correct such misrepresentations made with his knowledge and consent, and the creditor cannot actively conceal information. The law of contract, misrepresentation, and fraud adequately protect a guarantor against a breach of this type of duty. Atlantic Trust & Deposit Co. v. Union Trust & Title Corp., 67 S.E. 182, 184-85 (Va. 1909).

If a guarantor is thus protected, the signers most certainly would also be.

The Court erred when it denied testimony of damages to Mini Malls of America and Computer Factory Outlet.

Oklahoma courts have recognized that the existence of a duty depends on the relationship between the parties and the general risks involved in the common undertaking. See Union Bank of Tuscon v. Griffin, (Okla. 1989). Whether a defendant stands in such relationship to a plaintiff that the law will impose upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff is a question for the court. Id. 'Duty of care is not a concept that arises only by statute . . . . Whenever a person is placed in such a position with regard to another that it is obvious that if he did not use due care

in his own conduct he will cause injury to the other, the duty at once arises to exercise care commensurate with the situation in order to avoid such injury.' Union Bank, at 222.

Professor Prosser had this to say: The assertion that liability must . . . be denied because defendant bears no 'duty' to plaintiff begs the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. (Prosser, Law on Torts [3d ed. 1964] at pp. 332-333.)

In determining that negligence liability should be imposed to protect the foreseeable interests of third parties not in privity of contract, the Howell court relied on Prosser: "[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person." Howell, 272 S.E.2d at 23 (quoting Prosser, Handbook of the Law of Torts § 93 at 622 (4th ed. 1971)).

Appendix G

Mooring had a duty to provide an accurate payoff balance when requested and further to furnish supporting information when a dispute was raised. Not only is it logical that such would be provided, it is an industry practice. In addition, Mooring is in a superior position, and can, and did, refuse to release the collateral until whatever amount it claims is paid in full.

Moorings' actions equate to negligence not solely because of the first entry on the accounting records, but from the failure to investigate, correct the balance and communicate any such actions to Knight on a re-occurring basis for a period of more than 4 years.

> *Plaintiffs allege that within a period of two years immediately prior to filing of their petition there had been approximately 31 separate leaks of oil and salt water caused by defendants permitting their line to become so deteriorated, and that from such wrongful and unlawful acts and operations and as a direct, natural and proximate result The defendants had many opportunities to protect themselves against a judgment for exemplary damages. The evidence is conclusive that defendants' failure to timely replace the old lines with adequate lines shows a reckless or wanton disregard for the rights of the plaintiffs. Sunray DX Oil Co. v. Brown, 477 P.2d 67, 70 (Okla. 1970):*
>
> *Punitive damages may be properly awarded where the breach of a contractual obligation*

amounts to an independent willful tort. Jackson v. Glasgow, Okl.App., 622 P.2d 1088 (1980). And, in following Oklahoma Natural Gas Co. v. Pack, supra, the failure to properly measure the gas purchased from the Taylor # 2 well may be seen to constitute such a tort. The evidence presented may be viewed as showing that Delhi's actions in putting the wrong size orifice in the line, in neglecting to check the orifice size, and in suppressing the fact that the wrong orifice plate had been in place, were of such a nature as to give rise to an inference that these actions had been taken recklessly and in wanton disregard of plaintiffs' rights. As such this case would have justified the allowance of punitive damages. Sunray DX Oil Co. v. Brown, Okl., 477 P.2d 67 (1970. This question was then properly submitted to the jury. State ex rel. Pollution Control Coordinating Board v. Kerr-McGee Corp., Okl., 619 P.2d 858

. Mooring also only partially presents *Christian V Home Assurance Co., 577 P.2d 899, 902 (Okla.1977)*

"to expand [the] Christian holding to banking relationships" and has expressly stated that the "holding in Christian... does not generally apply to the relationship between a bank and its customer" First Nat'l Bank and Trust v. Kissee, 859 P.2d 502, 509 (Oklah. 1993) *citing Rodgers v Tecumseh Bank, 756 P.2d 1223, 1227 (Okla. 1988 "[t]o impose tort liability tort liability on a bank for every breach of*

contract would only serve to chill commercial transactions.

These cases state the logic in not applying that standard is that creditors can shop their loans, such was not the case with the Mooring/Knight relationship.

Mooring is not regulated by any agency, and therefore is free to do as it will. The possibility of being caught in activities such as has been demonstrated here is likely to be slight and the rewards, if not caught, can be great. If discovered, Mooring only has to claim mistake and is in no worse position that it originally bargained for with the selling holder of the note.

Since Mooring routinely trades in sub standard notes, there is a greater likelihood that the debtors, mortgagors, are devoid of the finances to pursue litigation, if they become aware of problems with the note. It is also likely that the majority of these debtors would not even know that the loan history was improperly calculated, due either to lack of knowledge necessary to recomputed it, or trust that the statements of their accounts are properly calculated or vulnerable to claims that additional charges and costs were included that increased the balance caused by whatever conditions created the classification of "substandard That is due to the faith and trust that is proscribed to companies regularly engaged in the business of lending

Moorings' transactions in this case are as stated in

Appendix G

Hessco:

> *"A transaction that is so unusual or uncommon as to render it an aberration in the relevant industry" falls outside broad range of terms of ordinary business terms in re* Hessco Industries In 9th bap 2003 Genis Credit Corp v Anderson in re Jan Weilert RV, Inc 315 f.3d 1192 10th cir 2003a US v Garrett 10th circuit, Robinson v US, US v Kahn

b. When a party has violated an act or statute, negligence may be inferred

> *The violation of an ordinance is to be deemed negligence per se if the injury complained of (a) was caused by the ordinance's violation, (b) was of the type intended to be prevented by the ordinance and (c) the Shoopman v. Travelers Ins. Co.*, 1974 OK 6, ¶ 12, 518 P.2d 1108, 1110-11 *injured party was one of the class meant to be protected by the ordinance.*; *Gasko v. Gray*, 1972 OK 141, ¶ 23, 507 P.2d 1231, 1235; *Garner v. Myers*, 1957 OK 224, ¶ 5, 318 P.2d 410, 413; *Tulsa Fruit Co. v. Lucas*, 208 Okla. 166, 170-71, 254 P.2d 788, 792-93 (1953). See *Boyles v. Oklahoma Natural Gas Co.*, 1980 OK 163, ¶ 14, 619 P.2d 613, 618 (Okla. 1980)

c. Burden of Proof – Negligence Per Se - Violation of Usury Laws and Conversion

The proof of such facts of the interest overcharge is prima facie evidence of Moorings' negligence and casts upon Mooring the burden of overcoming such

presumption of negligence by showing that their violation of said statute was excusable under the circumstances. This burden requires evidence reasonably explaining that such violation was due to something other than negligence, that the possibility of the overcharges could not have been discovered by ordinary and reasonable care and maintenance or to circumstances which could not reasonably have been controlled or altered by Mooring. Such explanation is sufficient, if it makes it appear equally as reasonable that Mooring made those over-charges through no fault of it own, as that such overcharges were the result of Moorings' negligence.

Mooring attempts to avoid their responsibility by shifting all arguments to their delayed post-litigation attempts at correcting the balance overstatement, ignoring their acts and omissions during the previous 3 years. Interrogatories answers and Admissions were avoided by stating that the balance had been corrected and therefore the issue was moot..

Proposition IV.

THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW CERTAIN CLAIMS

Oklahoma law it is the duty of the trial court to instruct the jury on the decisive issues raised by the pleadings and the evidence *Pacific Insurance Co. of New York v. Frank, Okl., 452 P.2d 794 (1969)* In the present case Knight was not required to elect the legal theory under which they were to proceed by virtue of

Appendix G

12.O.S.Supp. 1980 SS 264.1. The evidence provided in the pleadings and at trial supported the giving of instructions on conversion, negligence, or breach of contract and fraud, since under the evidence, it could be inferred that Mooring had intentionally or negligently entered the wrong beginning balance, intentionally or negligently failed to investigate when the numerous complaints were raised, and intentionally applied 100 per cent of all the payments to interest,

> *Mr. Velcota had the right to present inconsistent theories and have the jury instructed on those theories, even if his attorney chose to focus on only one in closing argument. State v Fernandez-Medinu, 14 1 Wn.2d 448, 6 P.3d 1150 (2000)*
>
> *Additionally, "it is a well-settled principle of law that 'a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.'" Bowers v. Hardwick, 478 U.S. 186, 201 (1986) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974. Finally, Motions to Dismiss are "generally viewed with disfavor, considered drastic remedies, and are granted sparingly." Harman v. Willbern, 227 F. Supp. 892, 894 (D.C. Kan. 1964). This is because "the primary objective of the law is to obtain a determination on the merits of the claim" therefore, "a case should be tried on the proofs*

rather than on the pleadings." 27A Fed. Proc.L.Ed. § 62:50.

The Motion to Dismiss standard requires a liberal reading of Plaintiff's Complaint with all inferences drawn in favor of Plaintiff with consideration given to all causes of action that could be viable under the same set of facts and circumstances pled in the Complaint, and under such a reading, the Knight/Mini Malls' Amended Complaint clearly passes this low standard.

The provided damages schedules included the evidence of conversion and usury (which arise from the same facts, that is, the application of every bit of every payment being applied to interest, (such claims would be mutually exclusive). The schedules included the amounts chargeable under these causes of action, both the amounts of interest collected and charged since inception, and the amount of interest collected after the proposed refinance date that would have not been received by Mooring but for its hostage activities as the foundation for a calculation of unjust enrichment. Aplt's Apx. at 397, 418, 568, 343 and Aplt's Sup. 260 and other Damage Schedules.

a. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF USURY

There was in force and effect in Oklahoma at the time of the occurrence the following statutes and laws:

Oklahoma Constitution - Article 14 § 2. Classification of loans and lenders - Licenses - Maximum rates of interest.

Appendix G

The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest, all contracts for a greater rate of interest than ten percent (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum

Oklahoma Constitution - Article 14 § 3. Excessive rate - Forfeiture of interest - Recovery of double interest.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm, or corporation taking or receiving the same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract: Provided, However, That this section may be subject to such changes as the Legislature may prescribe.

Appendix G

Okla 15 O.S. 266 The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest, and by contract parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted.

1. Mooring received $150,000.00 in payments on the note by February, 2005 and of that amount not one penny was applied to principal. Aplt's Sup. 511, 847.

2. Mooring collected interest in excess of the statutory rate

   The recalculated schedule prepared by Mooring post litigation determined that $ 79,583 should have been applied to principal..Aplt's Sup 658-660,

3. Moorings' charges to interest prior to correction were substantially higher.

b. (b.) THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF CONVERSION

Conversion states a cause of action under the Federal Tort Claims (Act)

The application of payments as stated in (a) clearly shows that Mooring converted the payments to interest in violation of the terms of the contract to its benefit..

That Mooring, post litigation, was forced to apply the payments in an appropriate manner does not undo the previous illegal and wrongful acts.

Appendix G

The tort of conversion is committed by one who wrongfully exercises temporary or permanent dominion over property owned by another. Griffith v. McBride, 188 Okl. 227, (1940); Davidson v. First State Bank & Trust Co., Okl., (1976).

"In Steenbergen v. First Fed. Sav. & Loan of Chickasha, , 1332 (Okla. 1987), relying on Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975) we recognized that once an account matures, a bank's withholding of a check which represented specifically identified and designated sums belonging to the depositor, and its use of the check in an unauthorized manner constitutes conversion.

We said ¶33 In Owens, the plaintiff brought an action for conversion against a bank which held up delivery of a check in a closed out account in order to pressure the plaintiff's husband to pay money on a financing arrangement that he was obligated to the bank. The Court recognized that the bank's mere refusal to pay the plaintiff the funds which she had on general deposit would not establish a case of conversion. However, the court found that the bank's conduct was so onerous that the facts established much more than a simple breach

of contract. The bank's action constituted a wrongful and illegal misuse of the plaintiff's funds and amounted to a misappropriation of them to the bank for its own use and benefit.

¶34 The bank in Owens argued that the plaintiff's funds could not be converted because they were commingled with all of the other funds which the bank had on deposit. [928 P.2d 290] The court rejected this argument because the bank itself specifically identified and designated the sums belonging to the plaintiff when it closed the plaintiff's account. The bank's refusal to deliver the check which represented the plaintiff's funds upon demand and its use of the funds for its own wrongful and illegal purpose to the plaintiff's detriment constituted the tort of conversion.

*Considering Beshara's allegations and their reasonable inferences, we find that, like the bank in Owens, Southern National's conduct may have been so onerous that much more than a mere breach of conduct occurred, and that under the facts presented here, Beshara has stated a viable claim against the Bank for conversion.*Beshara v. Southern National Bank 1996 OK 90 928 P.2d 280 67

c. (c.) THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIM OF

Appendix G

UNJUST ENRICHMENT

Mooring has also been unjustly enriched by interest charges of more than $80,000 since the time when Knight would have paid off the note through the re-financing had Mooring provided a legal payoff amount. The damages claimed is limited to the detriment suffered by Knight/Phoenix. Aplt's Sup. 944.

Another way to look at this benefit to Mooring is through its delay of the litigation it continued to accrue interest. The amount of interest that has accrued since the litigation began is approximately $ 65,000 Appellants have paid Mooring over $117,000 in interest.

d. (d.) THERE IS ADEQUATE EVIDENCE TO PROVE THAT FINANCIAL VIOLATED THE FAIR DEBT AND COLLECTION ACT and Restatement of Torts Section 552.

Contrary to Mooring's assertions at the pretrial conference, Aplt's Sup. at 734. all of the letters and communications of payoff balances issued were from Mooring Financial Corp, as servicing agent of Mooring Capital Fund. Aplt's Apx. at 703-718 and Aplt's Sup. 861,863.

This is obvious by the letterheads, testimony that Nalls was employed by Financial (Transcript 408-10:16) and trial testimony that Capital had no employees. Aplt's Sup. at 1000.

Proposition V.

Appendix G

THERE IS SUFFICIENT EVIDENCE TO PROVE A CAUSAL CONNECTION TO THE DAMAGES

It cannot be disputed that Mooring or any of it's' predecessors would not know, with certainty, that the collection of any amount in excess of that which was legally owed according to the contract terms would not cause damage. Also any delay in the release of the collateral would or could cause injury, much as a failure to release a lien on unencumbered property does.

The continual demands for amounts that had been disputed as being overstated justifies Phoenix' allegation that, Mooring, at the least, had no reason to believe the truth or falsity of the demands it published.—The maintenance of the "activity log" by Mooring which neither indicates that any investigation was undertaken nor shows responses to each of those disputes, provides the proof of Moorings' failure to act. Such failures were in reckless disregard of Knights' right to pay only the legal amount owed. Mooring was informed in August, 2002, that the balance was estimated to be no more than $270,000 at a time Aplt's Sup. at 489, 811., later discerned, that Mooring was claiming in excess of $380,000 .yet no inquiry or follow-up was initiated by Mooring to determine the cause of the difference. All further notices given by Knight also failed to initiate any communication from Mooring and no activity log was .presented for periods prior to October, 2003.

Knight has always had the right to retire the debt on the property at any time, either individually or

through the Corporation, to change title to all or any portion of the property, to refinance it and to receive personally the benefit of any funding obtained on the property not objected to by the new lender. Such desires or actions were not beyond the contemplation of the Mortgagee at any time.

Accordingly, Mooring and their predecessors knew or should have known that any damage sustained by Phoenix would thus impact Knight in her separate, individual, and personal capacity.

There is too much advertising by Lenders to attract new business touting "access the equity in your property to get additional cash for any purpose", and "refinance to lower your interest and your payments" for Mooring to contend that an early payoff was not foreseeable nor could they not have any inkling that even a delay in concluding that type of transaction was likely to cause injury.

Indeed, recent events have brought the role of lending to the forefront. President Obama recently said:

> *"There will be no real recovery unless we clean up the credit crisis that has severely weakened our financial system ..... the concern is that if we do not restart lending in this country our recovery will be choked off before it begins you see, the flow of credit is the lifeblood of our country. The ability to get a loan is how you finance everything from to a home to a car to a college education it is how stores stock their*

shelves, farmers buy equipment and businesses make payroll. When there is no lending ... businesses are forced to make layoffs our country suffers more and credit dries up even further. That is why this administration is moving swiftly to break this destructive cycle."

That statement is illustrative of Knight's predicament. She had developed and embarked upon a business plan that involved the sale of certain properties which would have produced cash flow from the proceeds of such sales, in addition to eliminating the costs of the continued ownership of those properties in the nature of unavoidable costs connected with real estate taxes, utilities, insurance and general maintenance. *Readying those properties for sale required additional investment.*

The Business Plan also involved the consolidation of previously incurred indebtedness, thereby reducing both the interest rates being charged and the monthly payment obligations. In order to accomplish those defined goals, it was necessary to re-finance the Note and access the considerable equity in the property. Several lending institutions had informed Knight that the only collateral that was acceptable was the Shopping Center since the other properties had no current stream of income.

Mooring's failure to provide the correct balance created the domino effect that followed and continues at present time. Without the refinancing, Knight could not accomplish any of the intended actions which would have eliminated all of the damages claimed.

Appendix G

The continuing need to pay the then current obligations and the ongoing costs with reduced income caused her to select accounts that could be paid without jeopardizing the overall net worth and leave others unpaid, this, in turn created additional interest burdens. The need to undertake litigation merely to obtain the legal balance so that financing could be obtained further exacerbated the injuries and Moorings' vexatious tactics and bad faith arguments have driven those costs beyond reason. At this point in time, one of Knight's businesses has totally failed, the other is in distress, she has incurred more indebtedness than was present at the time refinancing was approved in 2004 and the new financing obtained in 2008 which paid off Mooring is thereby insufficient to accomplish the delayed projects. Due to the lack the previous streams of income, it is not possible to obtain additional financing.

Mooring certainly cannot claim ignorance of either the nature or the continuing effects of the damages after litigation began inasmuch as they were notified not only in pleadings but also in itemized projects and lists of damages which were submitted 5 times.

The ongoing expenses are unrelated to the court's decision as to valuation, are fixed, supportable and therefore should have been admitted.

B. Moorings' Conduct Caused Knight and Mini Malls' Harm.

Obviously, there is a difference between the burden of proof in a claim for tortious

interference with contract, and with what is necessary to allege its commission. The archaic rules of code pleading have been replaced by the 1984 Code of Civil Procedure, thus placing the spirit of the law above strict compliance with the letter of the law. Niemeyer v. U.S. Fidelity and Guar. Co.1990 OK 32 789 P.2d 1318 61 OBJ

Causation consists of cause in fact and legal cause. Jones v. Mercy Health Center, Inc., 155 P.3d 9, 14 (Okla. 2006) Cause in fact is the traditional "but for" question, whereas proximate cause is a limiting doctrine that looks to both common sense and policy arguments. Id. Proximate cause is typically a fact question to be resolved by a jury; however, if there is no evidence from which a reasonable person could establish a causal nexus between the Mooring' act and plaintiffs' injuries, it may be determined as a matter of law. Id. If there is any conflicting evidence as to the issue, though, the issue must be left to the trier of fact.

Knight and Mini Malls have cause in fact. But for Mooring's negligent oversight of its account with Phoenix and Knight, Knight would have been able to submit the mortgaged property as collateral and obtained financing for the projects they have now either had to hold in abeyance or lost. Aplt's Sup. at 260 ¶ 14

"Proximate cause consists of two elements: cause in fact and legal causation. Legal causation concerns a determination whether legal liability should be imposed as a matter of law where cause in fact is established and depends upon

considerations of common sense and policy. Cause in fact, on the other hand, deals with the 'but for' consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct."

The question of causation is one of fact for the jury unless there is no evidence from which the jury could reasonably find a causal nexus between the negligent act and the resulting injuries. Brigance, 725 P.2d at 305.

In the cases of Oklahoma Natural Gas Co. V Courtney, 182 Okl. 582, 79 P.2d 235, at page 240, we said:

"A party guilty of negligence or omission of duty is responsible for all the consequences, which a prudent and experienced party, fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind."[Emphasis added]

In that case, the Court held that the gas company was bound to anticipate that shortly after gas was released from the mains to the meter, that someone would open the valve and turn gas into the plaintiff's lines. That in fact did occur and gas flowed into an uncapped line under the house that the Gas company had not detected. An explosion followed and judgment against the gas company was affirmed.

Appendix G

In Curtis v Shell, plaintiff was injured while trying to extricate his cow from a ditch which defendant dug and left open. The Court held that

> *"the major premise is the fact, not an inference, the cow was caught in the ditch by reason of defendants negligence, and, as one of the second premises ...the plaintiff did only a natural thing in the ordinary course of events, and, as another second premise, the fact that plaintiff had a right to preserve his property, and, as another second premise, the fact that plaintiff had a duty to minimize his damages, all of which brings us to only one inference, or conclusion, ...that defendant's original negligence was the proximate cause of plaintiff's injury. The defendant should have anticipated such action because plaintiff had a right to preserve his property "*

Mooring relies on Coker v. Southwestern Bell, 580 P.2d 151 (Okla. 1978), as Oklahoma's prime case on causation. However, in that case, the court stated the cause must be the efficient case, which means the negligent act must set in motion the chain of events that led to the injury. Id. at 154. (emphasis added). In reference to the case at bar, Mooring claimed in their motion that they didn't "start the fire"... Aplt's Sup. at 274. SW Bell could not foresee that a fire would occur, and Coker could not prove that if the phone had been working that the fire department would have arrived in time to save the building. Appellants maintain here, that Mooring and predecessors could foresee that

Knight and/or Phoenix might wish to refinance the Note to obtain extra cash from the equity, to reduce the interest rate, to reduce the monthly payment obligation, or just to merely retire the debt. It is illogical to assume that a Mortgagor would refinance without receiving some benefit. To be deprived of receiving that benefit by the unwarranted holding of the underlying collateral would cause damage. Whether or not the inability to obtain the desired proceeds from the planned refinance due to Moorings' actions was the "fire", Mooring most certainly commandeered the "spigot" and failed to answer the alarm. Knight has provided evidence of damages that would not have occurred but for Moorings' illegal holding of the collateral which would have provided the means with which to prevent the damages that followed. Aplt's Sup. at 274

Moorings failure to release the collateral for the just amount was the efficient cause that set in motion the chain of events and corresponding injuries that followed.

In fact, Knight provided receipts for materials as proof she had already undertaken those projects prior to applying for the re-financing and further, had continued as her limited funds would permit, at all times since towards completion of those goals.

The requirement that before one may become liable for his tortious injury to another, the injury complained of must have been reasonably foreseeable to the tortfeasor is firmly ensconced in the Oklahoma law. And, as we said in Atherton v. Devine, supra:

Appendix G

"Causation traditionally lies within the realm of fact, not law. In an action for injuries caused by the defendant's negligence, it is a jury question whether the injurious consequences resulting from the negligence could have reasonably been foreseen or anticipated. . . .

Foreseeableness becomes a question of law for the court only when one reasonable conclusion can be drawn from the facts." Keel v. Titan Construction Corp No. 53980 639 P.2d 1228 1981 OK 148

In the Oklahoma Uniform Jury Instructions, Civil, proximate cause has been called "direct cause," and defined as follows: "Direct cause means a cause which, in the natural and continuous sequence, produces injury and without which the injury would not have happened.

Proximate cause, obviously, is an essential element of a negligence action. "that which in a natural and continuous sequence, unbroken by an independent cause, produces the event and without which the event would not have occurred." Gaines v. Providence Apartments, 750 P.2d 125, 126-27 (Okla.1987); Johnson v. Mid-South Sports, supra, at 1109.

The foreseeability of injury as a result of the negligent act is also an essential element of proximate cause. Atherton v. Devine, 602 P.2d 634, 636 (Okla.1979).

Appendix G

The question of proximate cause becomes one of law when there is no evidence from which the jury could find a causal nexus between the negligent act and the resulting injuries. Thompson v. Presbyterian Hosp., Inc., 652 P.2d 260, 263 (Okla.1982); Jackson v. Jones, 907 P.2d 1067, 1073 (Okla.1995).

Proposition VI.

THE TRIAL COURT ERRED WHEN IT DENIED APPELANTS RIGHT TO ADMIT CERTAIN EVIDENCE INTO THE TRIAL RECORD

See Appellant Phoenix Central, Inc.s' Principal Brief VII. 1. as though pled herein

As early as 2006, Mooring was provided with the categories and estimated amounts for all the damages whether sustained by Phoenix or by Knight. They contested the damages incurred separately by Knight so those were withdrawn from the Phoenix case at Knight's deposition in May, 2007 and Mooring was notified they would be included in her case or joinder. Mooring has been provided with more than 4 distinct summaries of damages on various dates as these proceedings have progressed, and each was updated to include the ongoing unavoidable costs incurred as a result of Moorings' bad acts. Mooring cannot sustain any theory that it was unaware of the nature, type, or amount of damages being claimed and the causation after litigation, even it could sustain any theory of lack of foreseeability or contemplation prior to the action,

since the lawsuit itself constitutes actual knowledge.

In addition, under 23 OS, Section 61, which is the damage measure for these tort theories ..... "the measure of damages, except where otherwise expressly provided by the chapter, is the amount which will compensate for all detriment proximately caused thereby, whether anticipated or not." Aplt's Sup. at 761. (Transcript 39:17-41:19)

a All damages sustained by Knight, individually

See Appellant Phoenix Central, Inc.s' Principal Brief VII. 1 filed this day as though pled herein.

The Court excluded Knight's damages on the day before the trial under the assumption of Rule 701 and 702. In his statements, he quotes the exact basis why her testimony should be allowed, but excluded it due to his misunderstanding of the damages being claimed. The property values she intended to testify to were as he stated, certain values at a certain times She was not claiming values based on improvements made, nor decreases in valuation, although later damage schedules indicated a reservation to claim loss in value should it, at time of decision, be determined to be material upon reliable information. Aplt's Sup. at 745,746,781, 767,769

The court also appears to have misunderstood the category of interest being claimed. The court's ruling as to application of interest on the post litigation restated loan history does not negate the unjust application by Mooring of 100% of the payments to interest pre-litigation. Aplt's Sup. at 928.

Appendix G

The court ruled interest incurred on loans that would have been paid off with the new financing allowing a lower rate and a faster payoff were too remote to be claimed. Aplt's Sup. at 938,940,941,942,944.

Mooring falsely claimed they had no knowledge of the McElheny Trust loan of which Knight is the Trustee. Aplt's Sup. at 940,1050 and Transcript 289:1-291:1)

> *In* Winemiller et al. v. Lorton, 121 Okla, 99, 249 P. 406, *in paragraph 1 of the syllabus, we said:" The measure of damages is a matter of law properly to be considered and given in the instructions of the court. It is not an essential fact to be set out in the pleadings A party seeking summary judgment bears burden of demonstrating absence of genuine issues of material fact, and all reasonable doubts about the facts therefore are resolved in favor of the nonmovant)*

Mooring claimed that the delayed profits from the development property and the restoration of houses proposed were "new businesses" and therefore could not be submitted as being speculative and that Knight could not testify as to the amount of damages.

> *While start-up businesses, such as Channel 13, lack an actual record of past earnings, which decreases "the certainty with which one could predict future profits[.]...that fact should not automatically preclude new businesses from*

recovering lost profits....Rather, new businesses should be allowed to try to prove lost profits up to a reasonable level of certainty by other means...."Cook at 1166. Cook Assocs., Inc. v Warnick, 664 P.2d.1161, 1665, (Utah 1983) Once a defendant has been shown to have caused a loss, he should not be allowed to escape liability because the amount of the loss cannot be proved with precision. Consequently, the reasonable level of certainty required to establish the amount of a loss is generally lower than that required to establish the fact or cause of a loss" id. At 1166 (citations and emphasis omitted); see also Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 784 P.2d 475, 478 n.1 (Utah Ct. App. 1989) (While an award f damages based only upon speculation cannot be upheld, some degree of uncertainty in the evidence of damages will not relieve the defendant from compensating a wronged plaintiff.") Howell, 272 S.E.2d at 23 (quoting Prosser, Handbook of the Law of Torts § 93 at 622 (4th ed. 1971)

Other reasoning put forth that day was couched in terms of "contemplation" versus in the vacated summary judgment; it used the term "foreseeability"

Nevertheless, Appellants have offered sufficient arguments to raise a question of fact whether those damages were foreseeable and/or within the contemplation of the Appellees at the time of the breaches, as well as proof that Appellants' had actual knowledge of the ongoing injuries when damages

computations were presented to them.

Proposition VII.

THE TRIAL COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF THE EXPERT AND KNIGHT.

See Appellant Phoenix Central, Inc.s' Principal Brief VI-III. as though pled herein. Aplt's Sup. at 746,748,767,873.

Proposition VIII.

THE TRIAL COURT STATEMENTS AND ACTIONS AS RELATED TO KNIGHT'S CLAIMS AND DAMAGES WERE INCONSISTENT WITH DECISIONS RELATED TO PHOENIX.

Both Phoenix and Knight were parties to the Contract, therefore, at a minimum, a breach against one party would necessarily be a breach against the other.

Jury instructions name Knight, but her name was absent from the Verdict Forms.

CONCLUSION

For each of the reasons stated herein,[Knight] respectfully requests that the district court's judgment of March 12, 2009 be vacated be remanded to the district court for a new trial on damages and merits with instructions as this Court see fit.

Appendix G

STATEMENT REGARDING ORAL ARGUMENT

Appellant does desire oral argument. The unique nature of the legal issues regarding the strict construction of the charges of negligence, misrepresentation and omission of material facts, fraud, deceit, and the degree to which those acts were participated in, coupled with Moorings previous continual repugnant tactics used in defending the claims and counterclaims by Appellants are believed to be actions that are and/or can be utilized by other similar entities which are not subject to any regulation or oversight, therefore the determination of this case can have far reaching impact on a large and unprotected segment of the United States citizenry. The probability of re-occurrence of the offenses complained of is high without sending a clear message that such activities will not be tolerated.

The issues with those standards and lack thereof, the limitations imposed on written appeal and the time involved in doing so for both the litigants and the Court, make this a case where Appellant would like the opportunity to further make her case of appeal at oral argument in the belief that the spoken word can more efficiently present the issues.

CERTIFICATE OF COMPLIANCE

This brief is less than 14,000 words, uses a monospaced face and contains less than 1,300 lines of text as determined by the Word Count command executed on Word 2003, and therefore complies with Rule 32(a)(7)(B) of the Federal Rules of Appellate

Appendix G

Procedure.

_/s/ Judy Knight_____

Judy Knight

Respectfully submitted this 2nd day of August, 2009

Appendix H

APPENDIX H -APPELLANT'S FIRST BRIEF ATTORNEY FEES AWARD 09-6141 FILED October 5th, 2009

No. 09-6141

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
JUDY KNIGHT and PHOENIX CENTRAL
Defendants/Counter Claimants/Appellants
vs.
MOORING CAPITAL FUND, LLC and MOORING FINANCIAL
CORP,
Plaintiffs/Counter Defendants/Appellees.
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
No. CIV-06-0006-HE
HONORABLE JOE HEATON, DISTRICT JUDGE
APPELLANT JUDY KNIGHT'S PRINCIPAL BRIEF
ORAL ARGUMENT REQUESTED

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October 5, 2009

Appendix H

i

CERTIFICATE OF PRO SE APPELLANT

This appeal is a civil case involving more than one appellant, Judith Knight and Phoenix Central, Inc. Pursuant to 10th Cir. R. 31.3 the appellants have filed separate briefs because Knight intended to file pro se due to the multiple and various issues in this case, her intimate knowledge of the facts, her limited finances created by the circumstances of which this case complains, the ruling that Phoenix Central, Inc must be represented by counsel, and the time restraints arising therefrom.

I. TABLE OF CONTENTS

.....PAGE NO
CERTIFICATE OF PRO SE • APPELLANT.....II
I. TABLE OF CONTENTS..... II
II. TABLE OF AUTHORITIES IV
III. PRIOR OR RELATED APPEALS V
IV. APPELLANT'S OPENING 1
V. JURISDICTIONAL STATEMENT.....1
VI. ISSUES PRESENTED FOR REVIEW.....2
VII. STATEMENT OF FACTS AND THE CASE.....3
VIII. SUMMARY OF ARGUMENT..... 10
IX. PRESERVATION OF ISSUES.....12
X. STANDARD OF REVIEW..... 13

Appendix H

XI. ARGUMENTS.....
14
A. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AND/OR VIOLATED OKLAHOMA LAW BY AWARDING EXCESSIVE ATTORNEY'S FEES TO MOORING.....
14
B. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AND ERRED BY NOT GIVING ANY WEIGHT TO KNIGHT'S RESPONSE TOMOORING'S REQUEST FOR FEES AWARD
..... 15
C. WHETHER THE DISTRICT COURT ERRED BY ASSESSING FEES ON INCONSISTENT AND CONFLICTING RULINGS. ....
15
iii
1. MOORING DID NOT FILE ANY ACTION AGAINST KNIGHT. .....
16
2. THE DISTRICT COURT STATEMENTS AND ACTIONS AS RELATED TO KNIGHT'S CLAIMS AND DAMAGES ARE INCONSISTENT WITH DECISIONS RELATED TO
PHOENIX. .....
17
D. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AND ERRED BY FAILING TO MAKE FINDINGS PURSUANT TO THE EVIDENCE PRESENTED..... .....
17
1. THE TRIAL COURT GAVE TOO MUCH CREDENCE TO MOORING'S STATEMENTS AND UNDULY

PENALIZED KNIGHT IN THE AWARD OF FEES. 18

2. THE DISTRICT COURT ERRED BY NOT PLACING PROPER WEIGHT ON THE ADMITTED FACT THAT MOORINGS' ACTS CREATED ITS OWN EXHORBITANT FEES 22

E. WHETHER THE DISTRICT COURT MADE A FAIR AND EQUITABLE FEE DISTRIBUTION 23

1. KNIGHT DID NOT ENTER THE CASE UNTIL JANUARY, 2008.. 23

2. ALL CLAIMS AROSE FROM SAME FACTS, CONSEQUENTLY ALL ARGUMENTS IN DEFENSE WERE THE SAME..... 26

F. MOORING'S STATEMENTS WERE IN BAD FAITH. 29

XII. CONCLUSION..... 31

XIII. STATEMENT REGARDING ORAL ARGUMENT 32

XIV. CERTIFICATE OF COMPLIANCE 32

XV. CERTIFICATE OF MAILING..... 33

Appendix H

II. TABLE OF AUTHORITIES PAGE

Cases

Combs v. Shelter Mutual Ins. Co., 551 F.3d 991, 1001 (10th Cir. 2008)..... 14
Finnell v. Jebco Seismic, 2003 OK 35, 67 P.3d 339 (2003) 13
Genis Credit Corp v Anderson in re Jan Weilert RV, Inc 315 f.3d 1192 10th cir 2003 .... 32 *Hessco Industries In 9th bap 2003* 32
North Texas Prod. Credit Ass'n v. McCurtain County Nat'l Bank, 222 F.3d 800, 817 (10th Cir. 2000)..... 14
State ex rel. Burk v. City of Oklahoma City, 1979 OK 115, 598 P.2d 659 (1979)..... 13
US v Garrett 10th circuit, Robinson v US, US v Kahn.....32

Other Authorities

Prosser, Handbook of the Law of Torts § 93 at 622 (4th ed. 1971))..... 30
Prosser, Law on Torts [3d ed. 1964] at pp. 332-333 30
Restatement (Second) of Torts, supra, § 551 at 119..... 26
Sec. 21, p. 662, 38 Am.Jur 29

Rules

27A Fed. Proc.L.Ed. § 62:50 32

III. PRIOR OR RELATED APPEALS

Appendix H

Notice of Appeal of Doc 374 Filed August 9, 2009
Merits Cases:

Related appeals has been filed concerning the merits of this matter and can be found at Case No. 09-6075, Tenth Circuit Court of Appeals.

Knight Principal Brief (Amended) filed August 2, 2009

Phoenix Principal Brief filed July 17, 2009 Fee Award Case:

Phoenix Principal Brief filed October 5, 2009 Case No 09-6141.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDY KNIGHT and PHOENIX CENTRAL, INC.,
Appellant/Defendants/Counter Claimants,
v. Case No. 09-6141
MOORING CAPITAL FUND, LLC and
MOORING FINANCIAL CORP,
Appellee/ Plaintiff

IV. APPELLANT'S OPENING BRIEF

Appellant Judy Knight("Knight") submits the following opening brief in the above-referenced case against Appellees/ Mooring Capital Fund, LLC (Capital) and Mooring Financial Corp.(Financial) (collectively "Mooring") and respectfully requests that

this Court reverse the trial court's Order granting award of attorney fees in favor of Appellee. In support of the appeal, Appellant further states as follows:

V. JURISDICTIONAL STATEMENT

(A) The district court had original jurisdiction of the action below pursuant to 28 U.S C. §1332 since this action is based on diversity of parties and amount in controversy exceeds $75,000.

(B) The tenth circuit court of appeals has jurisdiction of this action pursuant to 28 U.S.C. §1291 since the district court has entered a final decision.

(C) A judgment on the merits was entered on March 12, 2009.

(D) An order on the award of attorney fees was entered on June 8, 2009.

(E) The Notice of Appeal for both Phoenix Central, Inc. and Judy Knight was filed on June 18, 2009.

(F) Appellant Judy Knight filed a Motion for Reconsideration on the attorney fees against her pursuant to F.R.C.P. 59 on June 18, 2009.

(G) The district court denied the motion for reconsideration on the attorney fees order on July 8, 2009.

VI. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court abused its discretion and/or violated Oklahoma law by awarding excessive

attorney's fees to Mooring.

1. Mooring did not file any action a The District Court erred by failing to conform its findings regarding the attorney's fee award pursuant to Oklahoma law and the Burk factors.

a. Calculating the "Lodestar" Fee

b. Applying the Burk factors.

2. The District Court erred by not allowing an evidentiary hearing on the attorney's fee issue.

B. Whether the District Court abused its discretion and erred by not giving any weight to Knight's Response to Mooring's Request for Fees Award

C. Whether the The District Court erred by assessing fees on inconsistent and conflicting rulings.

1. Mooring did not file any action against Knight.

2. The trial court statements and actions as related to Knight's claims and damages were inconsistent with decisions related to Phoenix

D. Whether the District Court abused its discretion and erred by failing to make findings pursuant to the evidence presented.

1. .The trial court gave too much credence to Mooring's statements and unduly penalized Knight in the award of fees

2. .The District Court erred by not placing proper weight on the admitted fact that Mooring's acts created its own exhorbitant fees

E. Whether the District Court made a fair and equitable distribution of Fees

1. Knight did not enter the case until January, 2008.

2. All claims arose from same facts, consequently all arguments in defense were the same.

F. Whether.the Court erred in not awarding Knight fees due to Moorings' bad faith arguments.

VII. STATEMENT OF FACTS and THE CASE

At its core, this case is about the improper actions of Mooring and the misplaced credence the trial court gave Moorings' testimony in opposition to Knight's evidence and testimony.

The misrepresentations and distortions presented by Mooring during the merits case unjustifiably influenced the award of attorney fees.

That decision in the merits case is being appealed to this Court as well. *See* Case No. 09-6075.

In order for this Court to gain an understanding of the impact of those contentions on the fees award, it is imperative that it gain at least a glimpse into the merits case to arrive at a fair determination of this appeal.

It is inferred from remarks in the fee award Order (Doc 363) that the Court based it's decision on

inaccuracies put forth by Mooring and misinterpretations of facts. Appl.App.473 Note 15, 474-475,478. It is unclear to what extent that misinformation had on the award due to the fact that the Court did not present a formula used in that determination. See Phoenix Brief

This merits case that should have been fairly simple, but was made overly complicated by vexatious and bad faith arguments and contentions during the proceedings by Mooring that had no basis in either fact or law resulting in litigation that has lasted more than 4 years Due to the connected issues and inferences during the litigation, this brief contains references to the Phoenix case since its inception to enable a complete picture and factual presentation of the events and results. See Phoenix Central Inc Principal Brief and Knight's Principal Brief and accompanying appendices Case 09-6075.

To avoid duplication Knight incorporates the Appellant Phoenix Central, Inc.s' Principal Brief and Appendix into this Brief for inclusion of additional fact details, arguments, identification of preservation of the issues and references to the Appellants Appendix. as though pled herein1[1].

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[1] References to the various appendices are shown as:those submitted with the Fees Appeals Aplt App__ for Phoenix, to the Appendices with the merits case are Phx.Apx for Phoenix,Aplt's Sup for Knight's

Appendix H

The transaction that provided the occasion for the wrongful acts of Appellees arose from Capital's purchase of a Note and Mortgage collateralized by a shopping center titled in the name of Phoenix Central, Inc. (Phoenix), a wholly owned corporation of Knight. Knight and Phoenix/Appellants were the makers on the Note which originated in 1992 with Central Bank of Oklahoma City. Bank One became the holder through its purchase of Central Bank, and later Bank One sold the instruments to Mooring Capital Fund, LLC as part of a loan pool on/or about July 25, 2002. Mooring Financial Corp is the servicing agent for Capital.

At the time Capital purchased the loan pool, Bank One had advised Mooring that the balance remaining was $ 316,040.12, comprised of $288,433.80 principal plus accrued interest of $27,606.32.(Phx Apx 452-461(Doc 178-2) Aplt's Sup 871[Tr 219:11-220:6];873 [221:3-221:25],Trial Exh 109 P2-5,) At all times previous to August 16, 2007, Mooring concealed its possession of that document and the legally collectible amount, and further did not use that amount in any of their recalculations of the loan history, even after admitting its existence. (Aplt's Sup 1023-1024 [Transcript 373:9-20])

Knight received the first monthly statement of account (billing) from Mooring during October, 2002. By that time Mooring had received at least $15,000.00 in note payments from appellants. However, the statement proclaimed that the remaining balance was $391,421.28. Mooring admitted this was overstated by

$90-105,000 .(Trial Exhibit 48, Aplt's Sup 1032-1033 [Transcript 381:21-382:16])

As more fully discussed below, from the time that Capital purchased the Note, Appellants have, individually and through Counsel, repeatedly lodged complaints with Mooring as to the overstatements and additionally requested documents and computations that would support the demanded amounts. For the most part those requests were repeatedly and continuously ignored, Mooring denied having the documents requested and any information finally furnished[2] was incomplete, incomprehensible and/or unresponsive [3]

Appellants wished to refinance the Center to obtain additional proceeds required to consolidate debts, reduce interest and monthly obligations, make renovations and repairs to property, and to otherwise further Appellants' profit objectives. Aplt's Sup 929[Transcript 279:4-280:1] Counterclaims Doc 50, Complaint 228)

As a result of Moorings' failures to adjust the claimed balance to a true and correct amount, Appellants were denied the ability to obtain a release of the collateral by paying the note in full for only the legitimate amount owed and obtain those additional

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[2] Oct, 2003, Dec, 2004, Feb, 2005

[3] Moorings' Response to the Appeal on the merits does not dispute the above facts.

funds. This failure injured Appellants in the form of ongoing costs that would have been eliminated, additional expenses that would not have been incurred and delayed or lost earnings that would have been facilitated by the loan proceeds.

Appellants' last payment on the Note was in February, 2005. Capital filed for Foreclosure against Phoenix in September, 2005 claiming $363,592.28 (State court Petition Doc 1- 3 Transcript 212:6-16). The District Court denied a petition filed by Knight in March, 2007, to intervene saying it would delay the trial set for later that year. (Order-Doc 206) Knight then filed claims in state court in May, 2007, but did not serve Mooring until November..[4] That case was removed and consolidated with the Phoenix case on Jan 30, 2008. Knight's Second Amended Complaint (Aplt's Sup 283) was filed in July, 2008. This complaint included claims that were identical to Phoenix' and was approved by the Court in August 2008. Knight was referred to as defendant thereafter, although Mooring filed NO complaints against her.

Although the Court did not make a declaratory judgment as requested by the complaints, it effectively did so by entering a judgment as to the amount[5] due in

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[4] This action had no effect as far as extending the litigation due to Moorings actions (Page xx) Appl Appx 468 Note 3

[5] 5 The judgment left unresolved the issue of one payment unapplied on Moorings' recomputation schedule At no time has Mooring ever used the appropriate beginning balance to calculate the true balance.

response to Moorings'motion for summary judgment. Phx Apx 495.

Without protest, the note was voluntarily and fully paid on November 3, 2008, in the amount shown on Moorings post-litigation recomputed loan schedule. Capital dismissed its claims on Jan 13, 2009 with a reservation for an award of fees from Phoenix according to the contract. Aplt's Sup 339. At that time Phoenix became Plaintiff, however, all activity continued with the designation of Phoenix and Knight as defendants to avoid confusion.

Mooring, from beginning to end, repeatedly argued they relied on incorrect information in arriving at the demanded amounts, that their misplaced reliance was Bank One's fault, that Knight and, during the trial, even that potential lenders should have forced them (by what means was unstated) to determine the correct amount due. Mooring argued that the overstatement had been caused by applying an incorrect interest rate and that they were unaware of some payments made to Bank One. The argument as to lack of knowledge of payments prior to the purchase date is irrelevant and such was admitted by Mooring on Dec 3, 2007. Aplt's Sup. at 225. Phx Apx. at 441 (Response Doc 189 Page 6). The claim that the overstatement was caused by using an incorrect rate of 9.75% is easily disputed by the facts, proven merely by

preparing schedules using the alleged "faulty" data.[6] Aplt's Sup. at 673, 678. Aplt. App 417-420,421-426

The facts show that those arguments arose only **after** the litigation and infer were invented in an attempt to legitimize the previously demanded balances. Doc 189 Aplt's Sup. at 1028. and Reply Doc 133. Knight Principal Brief in Case 09-6075 Items 16-21

Despite having the complete Bank One file and Knight's proposed calculation in January, 2006, the determination of an amount due that was considered to be a close representation[7] of the legal balance owed was still not made by Mooring until 2007, more that 1 year later and nearly 5 years after it purchased the note.

VIII. SUMMARY OF ARGUMENT

The standard on summary judgment makes it very clear that this Court must disregard all evidence in favor of the moving party and give credence to the evidence presented by the nonmoving party. The

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[6] Appellees also admitted that the amount of interest "thought to be" originally entered in their system was 8 25% as was reflected on the monthly statements.

[7] Mooring never adjusted the claimed balance to a computation beginning with the finally admitted true balance bargained for, thereby overcharging Knight approximately $5,000

District court failed to do this and thus based its decisions on untruths and a distorted and skewed version of the facts leading to an incorrect application of the law (Page 18 and elsewhere)

The undisputed facts resolve whether the Appellants' had any power sufficient to correct Moorings' deficiencies, other than asking for the Court's relief, and whether Mooring had total control of the release of the property for the amounts it demanded and therefore held Phoenix and Knight hostage to their demands Aplt's Sup. at 333-#25.

The trial court misinterpreted the basis for the damages claimed by Knight and thereby denied her right to present such injuries to the jury. Having no claims for damages due to the District Court's ruling, Knight's counsel conceded that Knight must withdraw. Transcript __, ___.

The District court erred in dismissing Knight's' claims for usury, conversion, unjust enrichment Aplt. App 335 claims to be determined as a matter of law, when it had discretion and the duty to consider all viable claims and alternate theories But for those errors, Knight would have to be included in the trial. .

Her inclusion in the trial would have necessarily resulted in prevailing on the breach claim since to do otherwise would be inconsistent with Phoenix' result.

In fact, the court should have ruled on the breach of contract claim as a matter of law since there was only one possible conclusion prior to trial

Absent the court's ruling and lack of rulings,

Appendix H

Mooring would have no basis for a fees award

The lower court erred in not giving proper weight to the cancellation of the first trial solely as a result of Moorings' continued withholding and concealment of information until 2 business days before the scheduled date. Phx Apx 435 or Aplt's Sup 236.

The court additionally erred in not recognizing Moorings bad faith. oppressive and vexatious arguments that prolonged the litigation unreasonably both before and after the aborted first trial. This resulted in both parties fees being unreasonably incurred, therefore Mooring created its own excessive amounts. Knight should not be responsible for Mooring intentionally increasing the cost.(Page 18—and 29)

The court erred in attributing the delay in the litigation to Knight when she was not even a party at the time the court refers to in the order. In addition, no delay was attributable to either her or Phoenix when the stated "required" information was furnished within 1 month of discovering the filing of the suit. (Page 18-22)

The Court then made unfair charges to Knight for fees not attributable to her.(Page 23)

IX. PRESERVATION OF ISSUES

These issues are preserved for appeal at Phoenix Central, Inc, et als' Objection and Response to Plaintiffs' Motion for Award of Attorneys Fees and Supporting Brief (Doc 353) Knight's Motion for

Appendix H

Reconsideration of Order Regarding Plaintiffs' Motion for Award of Attorneys' Fees and Supporting Brief Aplt. App 329-334, 335-355 and 479-522 for Orders Aplt.App.476-78, and 528.

X. Standard of Review

The issue of whether the district court erred in granting attorney's fees is reviewed for abuse of discretion. *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659 (1979). "Discretion is abused when a trial judge makes a clearly erroneous conclusion and judgment, against reason and evidence." *Finnell v. Jebco Seismic*, 2003 OK 35, 67 P.3d 339 (2003). Questions of law are reviewed de novo. Id. "The court has plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings." Id.

This statement for Standard of Review will be applicable to all issues contained herein unless otherwise noted.

Rule of Law

In diversity cases, attorney fees are a substantive matter controlled by state law. North Texas Prod. Credit Ass'n v. McCurtain County Nat'l Bank, 222 F.3d 800, 817 (10th Cir. 2000); Combs v. Shelter Mutual Ins. Co., 551 F.3d 991, 1001 (10th Cir. 2008). In this matter, the District Court stated that the statute governing the right to attorney's fees is 12 O.S. §936.[8]

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[8] *12* O.S. §936, in pertinent part, states as follows: "In any

Appendix H

Order, p. 6, Aplt. App. at 472.

XI. ARGUMENTS

A. Whether the District Court abused its discretion and/or violated Oklahoma law by awarding excessive attorney's fees to Mooring.

Knight incorporates Phoenix' Principal Brief in this case as though pled fully herein. The arguments and statements presented therein are as relevant to the drastically reduced award to Phoenix as they are to the unreasonably high fees charged to Knight.

In detailing the standards that should guide trial courts in awarding fees, Lindy held that first, the court must determine the number of hours spent by the attorney and in what manner those hours were spent; second, the trial court must attempt to place a value upon those services recognizing that different activities demand different compensation. The Third Circuit went on to say that while the hourly rate [598 P.2d 661] times the number of hours spent cannot properly be the sole criteria in awarding fees, this approach should nevertheless be the "lodestar" of the court's fee determination. Two additional factors are to be taken into account in determining the award of reasonable compensation for attorneys. One, that

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civil action to recover . on a note, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

attorneys' fees should be increased in proportion to the unlikelihood of success. And, second, the extent, if any, to which the quality of an attorney's work mandates *increasing or decreasing the amount to which the attorney is reasonably entitled. In evaluating quality of work, the court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of recovery obtained. Staton v Guarantee Bank*

B. Whether the District Court abused its discretion and erred by not giving any weight to Knight's Response to Mooring's Request for Fees Award

The Court Stated:

> *Phoenix 's objections to Mooring 's fee motion came in the form of one response filed by its counsel [Doc. #350] and one filed by Ms. Knight "pro se" [Doc. #353]. As corporations may not appear pro se, LCvR1 7.1, and the "pro se" response is, in any event, largely a reargument of the case on the merits, the court has given no weight to it. Appl.Appx.475 Note 19*

Since the award request was directed against Knight, she had the right to respond to that request as well as a fulfilled expectation that the Court would give full and fair consideration to its contents. Her response necessarily included a discussion of the merits of the case, since as here, the conduct, inferences and rulings have had a substantial impact

on the fees award.

The Court overstates the coverage of the subject in that Response as 19 of 24 pages of the filing are related solely to fees award arguments and cases in support.

C. Whether the District Court erred by assessing fees on inconsistent and conflicting rulings.

1. Mooring did not file any action against Knight.

Therefore, Mooring cannot collect any fees for the foreclosure action from Knight.

Mooring is apparently claiming a fees award solely on the basis of Knight not being permitted to present at the trial. Aplt. App. 337. In other words, since the Court failed to make a proper judgment by law and within his discretion she was effectively barred the trial, they win by default[9]. Thus, any award would be limited to the terms stated in the contract. Aplt. App. 474 There is nothing in the contract that provides for the mortgagee to receive fees for its own abuses and failures Aplt. App.472 Note 13. Capital admits that it breached the contract, therefore, it is difficult to see how Knight would be responsible for any fees in connection with that claim. . This claim and the declaratory judgment claim were brought by Knight (as well as Phoenix) to force Mooring to calculate a

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[9] No question as to the conclusion.

true balance. On this the parties succeeded. Therefore, it could be reasoned that Knight prevailed in substance and Mooring prevailed in form only.

The court states "it is clear Mooring is the prevailing party as to all claims against Ms. Knight and there is no question but that it prevailed both in form and substance." Aplt. App 474.

The breach of the covenant of good faith was obviously pled as a tort action for which Mooring is not entitled to claim fees. Indeed, Mooring claimed multiple times it had no duty under the contract to provide a balance owed. Therefore any expenses incurred by Mooring to defend against its failures cannot be recovered.

2. The District court statements and actions as related to Knight's claims and damages are inconsistent with decisions related to Phoenix.

The jury ruled for Phoenix on the breach of contract claim. Both Phoenix and Knight were parties to the Contract, therefore, at a minimum a breach against one party would necessarily be a breach against the other.

Jury instructions in the Phoenix trial name Knight, but her name was absent from the Verdict Forms.

D. Whether the District Court abused its discretion and erred by failing to make findings pursuant to the evidence presented

Knight incorporates Phoenix' Principal Brief in this

case as though pled fully herein. The arguments and statements presented therein are as relevant to the drastically reduced award to Phoenix as they are to the unreasonably high fees charged to Knight

1. The trial court gave too much credence to Mooring's statements and unduly penalized Knight in the award of fees.

The Court states:

Further, it is also true that the dispute was not readily resolved and this case drug on for years due, in substantial part, to the persistent refusal of Phoenix and Ms. Knight to ever offer their suggestion as to what the appropriate payoff balance was. Appl.Appx.475

By this statement, the Court erroneously places reliance on Moorings' unsupported self-serving statements in opposition to Phoenix and Knight's testimony and evidence, supported both by Moorings' own acknowledgment of facts and by counsel billing statements.

Mooring asserted during trial that the proffering of a loan schedule (Trial Exhibit Doc 109) in Jan, 2006 was "long after the suit was filed." Aplt's Sup 956-957[Transcript 306:15-307:21] They see no problem or delay in Mooring not correcting their claimed balances for a period of nearly five years.

See Phoenix Principal Brief for details of information provided.

Appendix H

The Court states:

Ms. Knight, as a former CPA, plainly had the skills and training to do so but, for reasons still not clear, never thought it appropriate to take the simple, problem-solving step of saying "Here's what I think the balance is...," so that Mooring and Phoenix could then identify the bases for their competing payoff computations. Appl.Appx.475

Knight had provided that information. Mooring both claimed she did not and that she did. Aplt's Sup. at 489, 813,Aplt's Sup. at 226 ¶ 3

Nevertheless, the Court only noticed the statements "she did not".

Regardless, it is unclear how the Court feels that such information would "identify" the incorrectness of Moorings' entries. Obviously, it did not, nor did it spur Mooring into any discussions to discover the discrepancies as Knight expected it would.

The Court also places a higher standard of care on Knight than is appropriate. At the same time Mooring is apparently excused from any standard of care, even though this is their chosen business for at least 29 years. The Court does not place any responsibility on Mooring, with their CPAs, attorneys, President, or other employees even though they had sole possession of documents that disclosed both the proper and improper information.

The Court states:

Appendix H

That this case blossomed into something far more than a "routine mortgage foreclosure" was due in no small measure to defendants' refusal to take obvious steps which could have solved the problem. To the extent that defendants' intransigence contributed to the attorneys fees incurred by Mooring in this fight, they are in no position to object to them. Appl.Appx.476

Inasmuch as Knight provided a complete and detailed computation to Mooring in January, 2006, the very beginning of the Phoenix case, it is not understandable how the Court can reasonably arrive at that conclusion. Aplt's Sup. at 224 Line 9-10.

The Court states:

It is true that Mooring's statements of the amount due varied — that was, in substantial part, what the case was about. However, it is also true that Mooring's confusion was due, in part, to confusion in the naming of documents filed by Phoenix in its bankruptcy. Aplt. App.475 Phx Apx at 14 and Aplt's Sup. at 806, 808. (Order 363 Page 9-10)

The court here ignores:

1. Mooring's own admission that this confusion only arose postlitigation Aplt's Sup. 224-225

2. The fact that the pre-purchase history of the note had nothing whatsoever to do with calculating the balance owed to Mooring.

3. That Mooring has never yet explained what

caused the overstatements pre-litigation

4. That Mooring found itself capable of providing a calculation to use for comparison at the January, 2006, meeting without the alleged "required" input from Knight. Aplt's Sup. at 671-677,224, and Doc 129-02-Exh A and B, Aplt. App. 396,415-416,417-420,421-426,(Loan Schedules.353-Exh 10:16)

5. That Knight, based on the limited information available[10], provided her loan calculation in January, 2006. Aplt's Sup. at 519, 873 (Trial Exhibit 109)

6. That Mooring had never provided a similar schedule before that date. Phx.Apx 224

7. That Moorings' assertions of using the incorrect "relied on" rate versus the correct rate mathematically does not create the overstated balance on their books as of the purchase date.

Aplt's Sup. at 562, 805.

8. That Moorings' initial statements of account indicated an even lower rate was used than stated in their alleged confused state. Aplt's Sup. 225.

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[10] Since Mooring had the complete Bank One file, and refused to furnish any loan history information from it until Aug, 2007, Knight used calculations in conformity with the Bank's prior method.

9. That the opening balance on Moorings' books should have been the amount they bargained for. Aplt's Sup. at 1027, Phx Apx 435 or Aplt's Sup 237(Order Doc 214 pg 2)..

10. The absurdity that Capital purchased the loan without knowing how much it could legally collect. Aplt's Sup. at 487, 1011,1014,1026,1043.

11. That Knight was not even a party to the case until after resolution of the balance was determined Aplt's Sup 329

The court states:

> *18Approximately half of the fees sought by Mooring relate to time spent before she became a party. ....Mooring.... seeks fees against Ms. Knight for periods when she was not even a party in the case. Appl.Appx.476 Note 18*

2. The District Court erred by not placing proper weight on the admitted fact that Mooring's acts created its own exhorbitant fees

In trial testimony Mooring admits it had the information it claimed to have needed by January, 2006. Aplt's Sup 224, 1023 At that point, the only action in court was Mooring's filing of its initial petition against Phoenix.

It took until July for Mooring to amend its petition down by more than $80,000 leaving it still overstated by almost $70,000. It took until the end of May, 2007 for Mooring to make further downward adjustment,

and the court did not make a ruling until August, 2007, 2 weeks before the pending trial. The trial that was cancelled due to Moorings' finally admitted knowledge of what was owed when it purchased the note. The response to the Motion to strike the trial, and vacate rulings the court had just made was not made until December, 2007 and not ruled on until March, 2008. It should be obvious who caused delayed and prolonged litigation and wasted costs.

This ignores the more than 300 statements made by Mooring throughout the litigation that were not appropriate aside from the "obligatory" legal puffery.

E. Whether the District Court made a fair and equitable distribution of Fees.

Knight incorporates Phoenix' Principal Brief in this case as though pled fully herein. The arguments and statements presented therein are as relevant to the drastically reduced award to Phoenix as they are to the unreasonably high fees charged to Knight

1. Knight did not enter the case until January, 2008.

Mooring has asked that fees be assessed against Knight that were incurred beginning in 2005 and continuing until after the trial. when she was not even a party.

Contrary to Moorings' statement virtually no time was spent attempting to foreclose on the note- -only that associated with filing of the first foreclosure petition in the Phoenix case. (Doc 340 p 7.) After all,

Appendix H

Phoenix and Knight's cases were precisely about Moorings' actions which denied them the right to fully pay the note without paying a huge and unlawful amount in violation of the contract terms.

Mooring submitted billings totaling $438,000 for the entire period including time spent after the trial. This is represented by nearly 2000 hours most of which was created by the bad faith arguments and Moorings other failures. .

Ignoring both the fact that Mooring did not ask for fees from Phoenix and that Knight was not sued for any action, the computation below illustrates the imbalance in the Court's order. Lacking any formula by the court, the award yields the following results using Moorings' stated formula although the Court disagreed with their theories.

Mooring changed counsel at the same time that any activity was required on Knight's entry in Jan, 2008. $213,000 was charged by that counsel in defending against both Phoenix' and Knight's claims. These billings included hourly rates that exceeded both their previous and the opposing counsel's by 25-30%.

The court states : *Approximately half of the fees sought by Mooring relate to time spent before she became a party.* Aplt.App 474 at Note 18 and further *Mooring proposes two 15% downward adjustments in its fee request, to reflect its view of the proper apportionment between fee-bearing and nonfee-bearing claims and to adjust for any time entries which are insufficiently detailed.* Aplt.App 471 Note 10

Appendix H

The Court's award of $88,000 equates to 41% of billed amounts or 59% of the "asked for" reduced amount. After adjustment for the more than $26,000 included for the actual trial, which Knight was barred from, and the after trial billings, the percentages rise to 47% and 67%. These calculations have not been adjusted to account that they include charges for both Phoenix and Knight. Therefore, if they were split 50-50, (which still unfairly charges Knight due to the identical claims of the parties), the percentages being charged to Knight changes to 94% and 134%[11]

On the other hand, the Court has awarded Phoenix only $49,000. Phoenix claimed (already reduced before submission[12]) $124,200 before the aborted trial and about $100,000 afterwards. Fees of about $79,000 have already been removed, therefore court is awarding only 22% of asked amounts and 16-18% of total billed amounts.

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[11] These calculations do not take into account the excessive hourly rate, any additional adjustment in excess of Moorings' proposed 30% as suggested by the Court, any reduction in % allocation to Knight due to identical claims of parties not requiring shifting out of hours chargeable to Phoenix claims.or for excessive hours charges to bad faith

[12] It is believed that all fees for Knight, for duplicative and other administrative hours have already been removed amounting to about $79,000

2. All claims arose from same facts, consequently all arguments in defense were the same.

Knight's and Phoenix' claims arose from the same set of facts Those facts being that Mooring:

1. without justiciable cause overstated the initial balance entered on their books

2. continuously and repeatedly failed and refused to properly investigate and pursue the actions necessary to provide the legally collectible balance on the Note.

3. and further that the actions and bad faith arguments taken to conceal those omissions and misrepresentations not only caused the litigation but prolonged it unreasonably.

Therefore, every argument and allegation put forth by Mooring in their defense would have been the same whether there was only one claim, one party, or multiples of each.

Mooring argued, both before and after Knight joined the case[13],

A. As to responsibility, none was attached to them since:

1. They had no duty to provide any balance information, 2. They relied on the wrong

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[13] With more and more embellishment as time passed:

information, ignoring, if true, it would be their own lack of due diligence and attention that created the alleged misconstrued reliance,

3. They could not have arrived at a true balance unless Knight had the amazing perception to know what information Bank One had provided to Mooring and what Mooring did with the information it solely possessed, and thereby point out the errors.

4. Knight "refused" to provide them with that information even though they didn't initiate any dialog or ask her to do so.

B.. As to damages flowing from the lack of a proper balance, that they:

1. were unconnected to Moorings' overstatements.[14]

2. were not supported and

3. the specific damages were not "foreseeable"[15]

Therefore, it is reasonable to infer the fees generated by these arguments would have been essentially the same whether the damages were of one type, generated from one source, in one amount, incurred by one or more parties, and in the amount of

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[14] Although no specific support is given for this contention

[15] After the Court introduced the "not in contemplation" argument, Mooring adopted that as well

$10,000 or $1,000,000[16].

Therefore, it's conceivable that only minimal fees were incurred by Mooring in the preparation for trial that would not have been incurred with Phoenix as the only claimant.

The Court stated:

Although there was substantial overlap between the claims of Phoenix and Knight (indeed, much time was spent in forcing defendants to focus on which claims or damages were Phoenix's, versus Ms. Knight's), it is nonetheless clear that a portion of the time spent by Mooring's attorneys was attributable to its claims against, or defending those asserted by, Phoenix. Appl.Appx.476 Note 20

Prior to Knight's entry, Mooring argued to exclude certain damages as being specific to Knight rather than Phoenix. Phoenix then voluntarily withdrew those items. Therefore, no significant time was involved. After her entry, Mooring claimed those same items should be excluded because they had no knowledge of them and/or that they couldn't tell which party suffered them.[17]

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[16] Mooring has spent time protesting amounts as low as $50.00.

[17] Mooring made the same oppressive, bad faith arguments of no prior knowledge regarding several of Phoenix' damages.

Therefore, any fees created by these arguments were the result of their own lack of attention or purposeful vexatious behavior. Mooring, although wrongly, claimed that Knight had not furnished any support for her damages or any accounting records, therefore it's inconsistent to claim they spent any time reviewing non-existent items.

F. Mooring's statements were in bad faith.

As detailed above, the examples of Moorings conduct support they have acted vexatiously and in bad faith. By continuing to put forth those arguments after the truth was out, it is even more apparent that those actions were wanton for oppressive reasons.

It is not only by Appellants statements that prove Mooring is unworthy of belief. Their own documents, statements and conflicting stories do that.

To strictly apply the American Rule in this case would be to do a great injustice to Knight and reward Mooring for its oppressive acts.

There can be no question that all power to control or alter the claimed balances were within the sole discretion of Mooring. (Aplt's Sup 333 #25, 414 #33)

Even after litigation, and comparison with Knight's calculations, Mooring did not make appropriate corrections until April, 2007 and those corrections were to a recalculated loan history, ignoring any explanation or schedule supporting amounts demanded between 2002 and 2006. To date Mooring has not provided any schedule that agrees with those

historically demanded amounts which might reveal their real intentions. They have however, testified that they recalculated the loan using various scenarios.(Transcript 430:1-433-7 and Jacquemin Trial Testimony (Aplt's Sup 1028-1029 Transcript 378:10-379:4) One wonders why such procedures would be undertaken except to develop what might be deemed to be a reasonable excuse for illegal activities, There is only one way to compute the correct balance.

Mooring is not regulated by any agency, and therefore is free to do as it will. The possibility of being caught in activities such as has been demonstrated here is likely to be slight and the rewards, if not caught, can be great. If discovered, Mooring only has to claim mistake and is in no worse position that it originally bargained for with the selling holder of the note.

Since Mooring routinely trades in sub standard notes, there is a greater likelihood that the debtors, mortgagors, are devoid of the finances to pursue litigation, if they become aware of problems with the note. It is also likely that the majority of these debtors would not even know that the loan history was improperly calculated, due either to lack of knowledge necessary to recompute it, or trust that the statements of their accounts are properly calculated or vulnerable to claims that additional charges and costs were included that increased the balance caused by whatever conditions created the classification of "substandard" That is due to the faith and trust that is proscribed to companies regularly engaged in the

business of lending

Moorings' transactions in this case are as stated in Hessco:

"A transaction that is so unusual or uncommon as to render it an aberration in the relevant industry" falls outside broad range of terms of ordinary business terms in re Hessco Industries In 9th bap 2003 Genis Credit Corp v Anderson in re Jan Weilert RV, Inc 315 f.3d 1192 10th cir 2003a US v Garrett 10th circuit, Robinson v US, US v Kahn *"the primary objective of the law is to obtain a determination on the merits of the claim" therefore, "a case should be tried on the proofs rather than on the pleadings." 27A Fed. Proc.L.Ed. § 62:50.*

XII. CONCLUSION

For each of the reasons stated herein, Phoenix respectfully requests that the district court's judgments on June 8 and July 8, 2009, be vacated and/or remanded to the district court for a hearing and redetermination of award of attorney fees with instructions as this Court sees fit.

XIII. STATEMENT REGARDING ORAL ARGUMENT

Appellant does desire oral argument. The unique nature of the legal issues regarding the strict construction of the complaints and the degree to which those acts were participated in, coupled with Moorings previous continual repugnant tactics used in defending the claims and counterclaims and repeated in the fees

requests by Appellants are believed to be actions that are and/or can be utilized by other similar entities which are not subject to any regulation or oversight. Therefore the determination of this case can have far reaching impact on a large and unprotected segment of the United States citizenry. The probability of re-occurrence of the offenses complained of is high without sending a clear message that such activities will not be tolerated.

The issues with those standards and lack thereof, the limitations imposed on written appeal and the time involved in doing so for both the litigants and the Court, make this a case where Appellant would like the opportunity to further make her case of appeal at oral argument in the belief that the spoken word can more efficiently present the issues.

Respectfully submitted this 5th day of October, 2009

/s/ Judy Knight__
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Appendix I

APPENDIX I --- **KNIGHT'S MOTION FOR RECONSIDERATION OF ORDER REGARDING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS FEES AND SUPPORTING BRIEF [Doc. No. 174]** Case 5:06-cv-00006-HE Document 367 Filed 06/18/2009 Page 1 of 18 j.Apx 479-522

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,)
)
Plaintiff,)
)
v.)
Case No. CIV-06-0006-HE
)
PHOENIX CENTRAL, INC., et al)
)
Defendants.

KNIGHT'S MOTION FOR RECONSIDERATION OF ORDER REGARDING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS FEES

Appendix I

AND SUPPORTING BRIEF [Doc. No. 363]

COMES NOW,Judith Knight hereafter "Knight", and submits a Motion to Reconsider Order [Doc. No. 363] In support of its Motion, Knight states the following:

1) On March 26, 2009, Plaintiff, Mooring Capital Fund, L.L.C., hereafter "Mooring", filed a MOTION for Attorney Fees *with Supporting Brief* [Doc. No. 340] That motion seeks to prevail upon the Court to award attorney fees in the amount of $306,644.34 from Knight as the "reasonable" costs of being the prevailing party on Mooring Capital Fund, LLC.'s (Capital") mortgage foreclosure action claims filed against Phoenix Central, Inc on Sept 23, 2005, pursuant to Okla. Stat. §936 and the contact terms of the Note and Mortgage

2) On April 13, 2009, Knight filed [Doc. No. 353], her Pro Se Response to Mooring's Motion [Doc 340] based upon Moorings request for an award of fees from Knight

3) On April 13, 2009, Phoenix filed [Doc. 350] RESPONSE to Motion for Attorney Fees with Supporting Brief [Doc 340] On April 13, 2009, Mooring filed [Doc 349] RESPONSE to Motion for Attorney Fees with Supporting Brief

a) On April 24, 2009, Mooring filed [Doc. 355] REPLY to Response to Motion *for Attorneys Fees* [Doc. 350].

b) On June 8, 2009, the Court entered an Order [Doc. No 363] stating the court concludes Mooring is entitled to receive an attorneys fee of $88,000 to be

paid by Ms. Knight.

4) On August 17, 2007, the Court ordered the trial stricken based on the Phoenix's Motion – discussed below

5) On March 28, 2008, the Court entered an Order [Doc. 214] granting Plaintiff's Motion to Vacate previous Orders that had been based on the Court's reliance on Mooring's statements that were unsupported and based neither on fact or law.

6) In the Order which is the subject of this motion the Court includes the following italicized statements followed by Knight's arguments.

a) *'Phoenix 's objections to Mooring's fee motion came in the form of one response filed by its counsel [Doc. #350] and one filed by Ms. Knight "pro se" [Doc. #353]. As corporations may not appear pro se, LCvR1 7.1, and the "pro se" response is, in any event, largely a reargument of the case on the merits, the court has given no weight to it.*

Knight has a right to represent herself and since the order awards fees to Mooring to be paid by Knight, the Court has a duty to consider the arguments presented in that document in that regard. That document is incorporated in its entirety herein, in the interest of not reiterating those facts and authorities again.

The arguments and citations presented were related to the fees award, if it seems to reargue the case, it is due to the fact that the issues that are the basis of the claims, which is improper conduct of the Mooring entities, are the same issues that created and extended

the fees unnecessarily.

In fact the Court itself has quoted Mooring's bad faith statements and arguments in its Order.

b) Taking all these factors into account — the time spent on Ms. Knight's claims versus those involving Phoenix, the apportionment necessary to reflect time attributable to only the contract-based claim asserted by Ms. Knight against Mooring, and all surrounding circumstances — the court concludes Mooring is entitled to receive an attorneys fee of $88,000 to be paid by Ms. Knight.

[6] *The parties do not contest the reasonableness of the hourly rates charged by the various lawyers in this case. Employing the claimed hourly rates and time spent, Mooring indicates it incurred fees of $438,000, but seeks $306,644.34 as a reasonable fee.*[7]

d) Mooring made adjustments to the total fees it claims it incurred (an amount excess of $438,000) and reduced its fee request by thirty percent to the sum of $306,644.34.

[18] *Approximately half of the fees sought by Mooring relate to time spent before she became a party Oddly, Mooring objects to Phoenix's request for fees for Mr. Watson prior to his formal entry of appearance in the case — an objection for which it cites no authority and the merits of which is less than obvious — but seeks fees against Ms. Knight for periods when she was not even a party in the case.*

The Court in its order has awarded $88,000 to Mooring or 20% of the total fees charged during the

entire case or using the reduced fee request 29% or the Court suggestion of one half 40%

Ignoring all other arguments and assuming that Mooring is entitled to any award of fees from Knight, the Court by its order has assessed fees against Knight equal to more than 86% of the fees charged by Mooring to defend against all of Knights claims. Total fees after Knight's entry for both parties (Andrews billing) was $212,891, the amount billed up to January 27, 2009, was 102,154 (379 hrs), From the descriptions of the billings charges after that date such charges were entirely in preparation for trial. The trial preparation itself would not be significantly increased due to the inclusion of two parties versus one when the like claims arose from identical causes. Moreover, additional amounts were billed prior to that date that would also be attributable to trial prep and issues regarding Phoenix, however for simplicity, and purposes of example using the amounts billed until then is illustrative of the inequity. Thereby, to award fees of $88,000 is to award more than 86% and a more detailed analysis of charges prior to January 27, 2009, would likely increase that percentage.

For comparison, charges to Knight by her counsel amounted to $34,000 plus $3200 for the intervention attempt.

f) Phoenix seeks recovery of $224,392.17, which also reflects certain downward adjustments from the total amount incurred by Phoenix and Ms. Knight.

Phoenix and Knight's combined fees charged totaled

$297,119 therefore an award of $49,000 represents less than 17% of those charges or 22% of the reduced amount requested. The reductions were made as to specific charges. Phoenix counsel had already overgenerously reduced the charges to include only one claim by $27,000 since the causes on the good faith claim were the same as on the other claims.and Knight's attorney clearly redacted out charges made solely for Knight's claims as well as other reductions.

These computations demonstrate the inequity of the judgments based solely on fees charged.

g) [8]*Mooring prevailed on summary judgment as to the issues directly related to the note balance and foreclosure, subject to resolution of one limited issue affecting the balance. The parties thereafter resolved the remaining issue and dismissed Mooring's claims on the note pursuant to an agreement. In that agreement, Mooring reserved its right to pursue attorney's fees in connection with that portion of the case.*

This summary judgment ruling was issued after more than a year's delay by Mooring in adjusting its initial claim from nearly $ 400,000 down to $212,000 as of April 8, 2005, Such adjustment was not voluntary nor a concession by Mooring but rather they were forced to recompute the balance using near[1] actual facts by

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[1]Near actual because it was based on Knight's estimated calculation according to the Chapter 11 Plan and Bank One's prior statements since Mooring refused to furnish the Bank One records in Mooring's possession that were

the litigation. Phoenix had a claim for a declaratory judgment and therefore the referred to ruling on August 7, 2007 was the answer to that claim. The Summary Judgment order was against Phoenix only as the only party that Mooring claimed against.

As to the agreement upon dismissal of the claims, the court also failed to consider the truest test of the parties' intention, the words of the contract clearly providing that Mooring reserved the right to collect fees as provided for in the contract Those fees would be limited to ones relating to the collection.

h)...[13] *To the extent that Mooring suggests the note provides a basis for recovery against Knight on her tort-based claims, the court concludes otherwise. Mooring provides no authority to support the idea that the note language would extend to other than contract-based claims*

i) Mooring substantially prevailed in its action against Phoenix on the note and for foreclosure,[8] but where Phoenix prevailed on a counterclaim arising out of the same subject matter. However, rather than seeking fees from Phoenix in connection with the note/foreclosure, Mooring has sought fees only against

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relevant to the correct legal balance. Even aftr disclosure of the true balance, Mooring did not make a good faith further adjustment for that, causing the Defendant's to overpay the legal amount by nearly $5,000. Contrary to Mooring's testimony, they did not make any effort to "satisfy" Knight nor did she request any effort other than to arrive at the true balance.

Appendix I

Ms. Knight

Both Phoenix and Knight prevailed on the contract claim and declaratory judgment since their goal was to obtain at least a reasonably accurate balance legally owed, while Mooring did not totaling succeed since it's claim was for nearly $400,000 and it received only $212,000 as of the date of claiming.

j) With respect to the fee claim of Mooring, it is clear that Mooring is the prevailing party as to all claims against Ms. Knight and there is no question but that it prevailed both in form and substance. However, it is also clear that Mooring is entitled to recover an attorney's fee from Ms. Knight only on the contract-based claim upon which it prevailed – Ms. Knight's claim for breach of the implied covenant of good faith and fair dealing. Prevailing on the other claims, all of which sound in tort, is not a basis for fees under Oklahoma law.

This decision is on appeal. It is inconceivable that Phoenix can prevail on an identical claim with identical causes and Knight cannot. Also see Doc 353

k) All parties appear to concede that 12 Okla. Stat. §936[12] is applicable to the contract- based claims on which someone prevailed. As §936 appears to provide a sufficient basis for recovery of fees by the prevailing parties on the contract claims, it is unnecessary to determine whether the note provides an alternative basis for such fees.

Mooring states in Doc 355 Reply to Response to Motion… that "Mooring is not claiming it is entitled

to recover fees on these claims pursuant to 12 Okla.Stat. §936; rather, Mooring is claiming fees on the claims which sound in tort, and is entitled to an award of those fees, pursuant to the express terms of the Amended Note and Mortgage."

Knight does not agree that Mooring is entitled to recovery under that statute. See Doc 353

l) The substantial fees are due in part to the fact that this case has been prepared for trial twice. Both parties were nearly ready for trial when the court granted summary judgment to Mooring in 2007. Thereafter, Mooring belatedly produced discovery it should have produced earlier, necessitating the revisiting and partial vacation of the summary judgment. This resulted in additional discovery being necessary and further delays before the case could be ready for trial a second time.

By this statement the Court concedes that it was Mooring's action, or rather omissions, that caused the cancellation of the trial and the need to redo nearly all the preparations a second time.

Fees incurred by Mooring up to this date were $226,000 -(438,000- 212,89). That would have been incurred for recalculation of the loan amounts, defending against Phoenix counterclaims, and preparing for the trial that was aborted due to their omissions. The only part of the trial preparation that was not wasted was the depositions taken of Phoenix' witnesses. The only fees incurred in the pursuit of foreclosure would be the time spent actually preparing and filing the original petition.

Appendix I

m) [15]*Mooring 's carelessness in discovery (and the circumstances do suggest carelessness rather than intentional misconduct, as defendants suggest) followed on the heals of substantial discovery problems caused by defendants and defendants' dodging and weaving as to expert witnesses, all of which also contributed to the costs of litigation*

Mooring presented no proper evidence of any compelling consideration that would justify the those parties' long and continuing failure to acknowledge the disputes, to investigate the matters, to communicate any efforts to Knight, to furnish documents and information requested, or to adjust the balance. In fact Mooring's own activity log supports the fact of a number of complaints lodged by Knight, individually or through counsel, while the log is absent of entries noting action taken on most of those and is totally devoid of any entries prior to October, 2003..

Mooring had made much fodder over the expert issue. It can hardly be said that any large amount of time was spent by Mooring due to Phoenix not presenting an expert, certainly less time than would have been spent if Mr Lisle had been utilized. In fact, any time, other than the deposition of Dr. Horrell, spent on this matter was that which Mooring, in their apparent paranoia, created protesting the use of any expert testimony or any remotely resembling that. Mr. Lisle was finally not used since the Court did not approve his inclusion until on a Friday with a report due on Monday.

The discovery issues referred to are misrepresented

and overblown by Mooring and do not begin to reach the level of Mooring's failures to provide information, only some of which has been reported to the Court on various occasions.

n) The bigger apportionment issue with respect to Mooring's motion relates to the fact that it seeks fees only against Ms. Knight. A substantial portion of the fees Mooring incurred were with reference to its claim against Phoenix — not Knight.[17] *Indeed, Mooring's request includes attorney time spent for periods when Knight was not even a party in the case.*

This is a gross overstatement (sic), Knight would venture that more than 99% of the fees generated were either to compute the balance correctly, which was Mooring duty to do so before litigation began, or in defense of the claims against Mooring.

The only charges related to its claim against Phoenix would be the original filing and perhaps the approximately $6,140 charged by Andrews to effect the release of the lien and dismissal of the claims, if the Court were to determine that such charges were in fact reasonable.

o) Although there was substantial overlap between the claims of Phoenix and Knight (indeed, much time was spent in forcing defendants to focus on which claims or damages were Phoenix's, versus Ms. Knight's), it is nonetheless clear that a portion of the time spent by Mooring's attorneys was attributable to its claims against, or defending those asserted by, Phoenix.

The Court does not provide any basis for determining

that "much time was spent" nor what "much time" is. Neither does it offer a basis that Knight or Phoenix had to be "forced" to differentiate between Phoenix and Knight's damages. Therefore, it is apparent that the Court took Mooring's bald statements as fact. It has been well known since the first settlement conference which damages belonged to whom and in fact was even ruled on by the Court. That also begs the question, how much time would be spent by Mooring on a particular item of damage if it belonged to one party as versus the other?

p) It is also true that Mooring's confusion was due, in part, to confusion in the naming of documents filed by Phoenix in its bankruptcy. Further, it is also true that the dispute was not readily resolved and this case drug on for years due, in substantial part, to the persistent refusal of Phoenix and Ms. Knight to ever offer their suggestion as to what the appropriate payoff balance was. Ms. Knight, as a former CPA, plainly had the skills and training to do so but, for reasons still not clear, never thought it appropriate to take the simple, problem-solving step of saying "Here's what I think the balance is...," so that Mooring and Phoenix could then identify the bases for their competing payoff computations. That this case blossomed into something far more than a "routine mortgage foreclosure" was due in no small measure to defendants' refusal to take obvious steps which could have solved the problem. To the extent that defendants' intransigence contributed to the attorneys fees incurred by Mooring in this fight, they are in no position to object to them.

Appendix I

This is another example of the Court placing undue reliance on the unsupported statements made by Mooring and ignoring Knight's supported statements. Mooring's continual statements about using the wrong plan even defies logic. Who would purchase a note without knowing what amount they were entitled to collect on it? Their own due diligence report provided at least an approximation before they even bought the note. The documents they provided the week before trial further confirmed they had the correct information. Jacquemin testified at trial that the balance given them at time of purchase was the amount that should have been entered on their records. Jacquemin also testified in deposition there would be no reason to doubt the accuracy of the banks figures.

Nalls was able to provide a schedule that attempted to justify the balance but not until after they filed the foreclosure, and not until Phoenix counsel ask that they provide such so that the parties could compare and determine the areas of difference. Although that schedule did not agree with any balance previously published, it proved that Mooring was capable of providing it. Simply changing the rate from the contract rate on that schedule to 9.75% disproves the argument that the cause of the overstatement of the balance in July, 2002 was "mistaken" data.

The next paragraph also ignores facts presented by Knight in favor of Mooring. Knight testified she had informed Mooring of her estimate of the balance in August, 2002, supported by contemporaneous notes on

the "Hello" letter and again at least once through her attorney. What she could not inform Mooring of was why they had a different amount, since they refused to provide any information to her. It was Mooring's duty to provide that information. In fact, the various statutes that have to do with matters of incorrect balances, disputes and resolution generally provide from 20 to 60 days to respond, therefore, Congress feels that is adequate response period. However it took Mooring 5 years to provide the correct information. It took them more than 4 years to make an adjustment that was close to an accurate amount, and that only came more than one year after Knight provided them with a detailed analysis of what she believed the proper method and computation was (From Dec, 2005 until April, 2007). Ironicallly, when Mooring protested Knight testifying to "any issues she was qualified to do" , they insisted she was not capable of testifying to this particular matter.

How is it that the "simple, problem-solving step" is not so simple when it is viewed as being in Mooring's court, the party who had all the documents, knew what they had purchased and had control over the amounts being claimed and had been in this business for 29 years dealing subprime loans, a substantial number of which would have involved either past or current bankruptcy filings .?

9. The following excerpts are from Doc 178 which lists the reasons the Court should Strike the Trial and Vacate its previous Orders is as true today as they were then. In fact, they are more reprehensible in that

Mooring continues even at trial and the fee ward request to repeat the bad faith and vexatious acts, and in some respects has indeed amplified them.

On August 16, 2007, less that five days prior to trial, Mooring produced additional documents to Phoenix which drastically changed the terrain of the case.. These are documents that had not previously been produced to Phoenix at any time over the first two years of the instant litigation, notwithstanding the fact they had been withheld for the three years preceeding this action despite numerous requests for production or contents. These documents prove the following assertions:

Mooring was aware of the proper interest rate to apply (prime plus 2%), as of the date Mooring acquired the loan. See Mooring Supp. 8/16/07, No. 0952 attached hereto as Exhibit 1.

Mooring was aware that the Bank One balance upon purchase was $288,433.80 in principal and $27,606.32 in interest for a total balance of $316,040.12[12]. See Mooring Supp. 8/16/07, No. 0952 attached hereto as Exhibit 2.

Although irrelevant to the computation by Mooring, the documents disputed Mooring's argument that they

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[2] In spite of the Bank One balance of $316,040.12, Mooring's first statement to Phoenix on October 15, 2002, after receiving $15,000, stated the balance was $391,421.26 a difference of $90,381.14.minus the two months interest

were unaware of all payments made to Bank One.

These documents are contrary to David Nalls previous sworn testimony specifically that Mooring relied upon the unconfirmed Fourth Amended Bankruptcy Plan provided to it by attorney James Larimore. The Court relied upon this assertion by Nalls in its Order granting the Plaintiff's Motion for Summary Judgment [Doc. No. 173]. These documents clearly show that Mooring's story of confusion and uncertainty as to the Bank One balance and proper interest rate is nothing more than a story. Mooring clearly knew the proper interest rate to apply, and the balance of the Note when it was purchased in July 2002, but failed to properly apply it. It is evident that Mooring **did** have knowledge of the proper interest rate at the time of purchase in 2002.

The Court made specific rulings and findings of fact that now are proven incorrect by the production of these documents, including but not limited to:

a. "After it filed this lawsuit (in 2005) Mooring discovered that it had relied upon an incorrect version of the defendant's confirmed plan of reorganization to determine the amount of debt." See Order [Doc. No. 173] page 5.

b "Mooring realized the error in December 2005, and also discovered in January 2006, that Phoenix had made $15,000.00 in payments that Bank One had not credited to Phoenix's debit." See Order [Doc. No. 173] page 5.

c. "The evidence, however, is insufficient to create a justifiable question as to whether Mooring materially breached its contractual obligations within the meaning of the applicable rule." See Order [Doc. No. 173] page 5.

d. Classifying Mooring's actions as a "mistake" in quoting the payoff balance. See Order [Doc. No.173] page 5

e. "While the evidence before the court shows that Mooring was mistaken as to the account balance, it does not show that its behavior was intentional or fraudulent." See Order [Doc. No. 173] page 11. These documents produced show that it was not simply a mistake.

f. ********** L

g. "Phoenix makes a variety of arguments to suggest wrongful conduct in excess of mere negligence. Rejecting Mooring's position that it was misled by relying on the wrong version of the "Fourth Amended Plan", Phoenix argues Mooring knew the proper interest rate because it had access to the Bankruptcy Court's order denying confirmation of the debtor's second amended plan, which referenced the rate ultimately adopted in the confirmed plan. Defendant's brief, p. 7. The argument is a classic non sequitur." See Order [Doc. No. 173] pages 14-15. The arguments previously asserted by Phoenix are not non sequitur now that Mooring produced these additional documents.

h. "Phoenix argues that Mooring, through Mr. Nalls, "recklessly and knowingly failed to inform the accounting supervisor that the accounting software FAS contained an inaccurate and grossly inflated payoff balance and inaccurate payment history." Defendant's brief, p.10. However, Nalls testimony, not controverted by Phoenix, was that once Mooring realized there were errors in the FAS, it relied on spreadsheets to analyze the state of the Phoenix loan, not the FAS. Order [Doc. No. 173] page 15. In short, the court can discern nothing in the circumstances shown here that goes beyond simple negligence or carelessness on the part of Mooring. The undisputed facts show that Mooring continued to rely, erroneously, on what it mistakenly believed was the correct plan. Phoenix continued to object to the payoff quoted, but declined to provide any information as to what Phoenix thought the correct amount was. Mooring may well have been negligent in these circumstances, but the proffered evidence does not create a justifiable question as to "gross recklessness or wanton negligence." See Order [Doc. 173] page 16. It is clear through Mooring's eve of trial disclosures that Mooring's behavior rises to the level of "gross recklessness".

i. "Determination by the Court that the Defendant's claim for negligence fails because the evidence does not support "willful, intentional, purposeful or malicious conduct".

Appendix I

See Order Doc No. 173 page 17. The documents produced on August 16, 2007, place this issue in controversy, and do not support the Court's previous rulings.

j. The determination by the Court, and reliance upon Nalls testimony that Mooring became aware in December 2005 that it is was relying upon the upon the wrong bankruptcy plan and it learned of the additional $15,000.00 in payments in January 2006. See Order [Doc. No. 173] page 19.

k. That Mooring discovered its error in the loan balance in December 2005. See Order [Doc. No. 173] page 19, footnote 26.

l. Sanctioning Phoenix for the failure to comply with its obligations under Rule 26 and the discovery rules in the form of not allowing Phoenix to introduce evidence related to lost lease revenue. See Order [Doc. 174] page 12.

Although Mooring has habitually complained that Phoenix has failed to comply with Fed. R. Civ. P. 26 and provide complete discovery responses, Mooring has produced the following documents after discovery cutoff:

a. Mooring's Supplemental Documents Production Bates No. 0366-0946 two days prior to Nalls deposition on May 22, 2007.

b, In June 2007, Mooring produced Mooring Supp. Bates No 947-949.

c. Mooring Second Supplemental Discovery Responses Bates No. 0001— 0574, on July 10, 2007[3], which was one day prior to trial exhibit exchange. See attached e-mail from Nichols attached hereto as Exhibit 4.

d. The production of documents on August 16, 2007, Mooring Supp. Bates No. 0950-0959 which clearly are relevant.

Mooring has produced 1,165 documents since the time of discovery cutoff. This clearly is not within the intention of disclosure pursuant to Fed. R. Civ. P. 26 and is not

IN CONCLUSION, Knight maintains that the reasoning stated in the Court's order is prejudicial in that it continues to rely on Mooring's unsupported statements as fact and that such prejudice is demonstrated further by the emphasis and wording used when referring to Phoenix or Knight as compared to the minimus wording referring to Mooring.

In addition, the application of ratios to total fees is not equitable even if such were chargeable to Knight and additionally has the effect of charging Knight with fees related to Phoenix, which the Order clearly states are not chargeable to her. .

That Knight has no obligation to pay any fees that were incurred since Phoenix was the only party claimed against.

That Mooring cannot recover for prevailing on Knight's tort claims, including the good faith and fair dealing, since Mooring only preserved the right to

recover for fees specified in the note and mortgage and further that Mooring is not entitled on that one claim as discussed in Doc 353.

Knight sincerely apologizes for the format of this document that time constraints did not allow for better form, organization and articulation. And indeed, the repetitive nature of the documents eludes and fights with the rationale of the respondent .

Based on the reasons stated herein and in Doc 353, Knight prays that the Court will

1. Strike the current order to allow for consideration of Knight's Response [Doc 353] and this Motion.

2. Permit a hearing to discuss these matters more fully or allow additional time to prepare a more articulate Motion

3. And make a new determination of fees appropriately chargeable.

Respectfully submitted,

_/S/ Judy Knight_____

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Appendix J

APPENDIX J – KNIGHT'S OBJECTION AND RESPONSE TO MOORINGS' MOTION FOR AWARD OF ATTORNEY FEES

Doc 353 JApx 335-462

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Doc 353 Filed 4/13/2009 Page 1 of 27

MOORING CAPITAL FUND, LLC, et al

Plaintiffs.

vs.

PHOENIX CENTRAL INC., et al,

Defendants,

Case No 0 6 - 0 0 0 6 - H E

PHOENIX CENTRAL, INC, ET ALS' **OBJECTION AND RESPONSE TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS FEES AND SUPPORTING BRIEF**

Appendix J

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(405) 447-1010
For Defendant
April 13, 2009

Appendix J

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,)

Plaintiff,)

vs.) NO. CIV-06-0006-HE

)

PHOENIX CENTRAL, INC., ET AL.,)

)

Defendant

PHOENIX CENTRAL, INC, ET ALS' OBJECTION AND RESPONSE TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS FEES AND SUPPORTING BRIEF

COMES NOW, Defendants Phoenix Central, Inc. ("Phoenix") and Judith Knight ("Knight") and submit her and its Objection and Response to Plaintiffs' Motion for Award Of Attorneys Fees And Supporting Brief (Document No. 340) That motion seeks to prevail upon the Court to award attorney fees in the amount of $306,644.34 as the "reasonable" costs of being the prevailing party on Mooring Capital Fund,

LLC.'s (Capital") mortgage foreclosure action claims pursuant to Okla. Stat. §936 and the contact terms of the Note and Mortgage.

HISTORY OF THE NOTE DOCUMENTS

On or about July 25, 2002, Mooring Capital Fund, LLC, ("Capital") purchased a pool of loans from Bank One which included the Note and Mortgage (Hereinafter, referred to collectively as "Note" or "Loan") of a strip shopping center ("Center") owned by Phoenix Central, Inc. of which this case is concerned. During July, Phoenix received its first notice of this transaction by way of correspondence from Bank One and from Mooring Financial, Inc. ("Financial"), the loan servicing agent for Capital (Collectively referred to as "Mooring"). Neither communication contained any financial information. The Note and Mortgage, which was a construction loan to be used for the repair and rebuilding of a significant portion of the Center, had originated with Central Bank of Oklahoma City in July, 1992,. The loan was limited to $400,000.00 at an interest rate of prime plus 2%. The Note was later converted to a "permanent" loan with no change in the basic terms other than fixing the payments at $4600.89 due monthly. (See Exhibits 1. 2. 3.and 4.)

Bank One acquired the Note upon its purchase of Central Bank and became the holder in due course. Phoenix was late making the December 15, 1997, payment and Bank One declared default as of that date on January 5, 1998, and filed for foreclosure on January 23, 1998. That action proceeded to foreclosure unopposed and judgment was entered on June 26,

1998, against Phoenix and Knight.

Phoenix filed a voluntary petition on March 9, 1999, to stop a proposed sale of the property. The Bank One obligation was listed as disputed, contingent, and unliquidated in an estimated amount of $312,000. Under the Reorganization Plan which was confirmed on 2/28/01, it was established that the monthly payment would be $5000.00 to begin 30 days after confirmation, and in compliance with Court order issued on June 2, 2000, that the interest rate post petition would continue at prime rate plus 2%. Phoenix also agreed to extend the maturity date to 2015. The Court has ordered and Mooring has stipulated that the Confirmed Plan is res Judicata of the terms of the Note. (See Exhibits 5.)

Mooring declared default as of April 8, 2005, and Capital and filed a petition asking for summary judgment on the Note [1] in State Court against Phoenix on September 21,2005 claiming a balance of$363,592,28. [2]

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[1]Capital did not serve Phoenix at its known address but rather filed through the Secretary of State without permission of the State Court.

[2] 2. In fact, Capital, at the time it filed the foreclosure did not hold a legal interest in the Mortgage, since it had assigned all of it rights, title and interest in it to United Bank in December, 2002 and assigned back to Capital in July 2006. Therefore, its' action deceived two courts of this state

Appendix J

Phoenix removed the Case to the District Court on 1/4/06. After meeting with opposing council in an unsuccessful attempt to compare and resolve the disparity in the parties' calculations of the amounts remaining due on the Note. Phoenix filed its first counterclaims on 3/29/06 (Doc #14), including a request for declaratory judgment on the balance.

On 7/11/06 Capital amended its claim to $271,653.73 principal plus interest of $3,961.62. as of 4/8/05. (Doc # 38) and added count 2 -Mortgage Foreclosure and count 3 -Application for Receiver Pendente Lite.

After much litigation and amendments, Capital eventually filed for summary judgment on its claims on 5/15/07 (Doc #120) The District Court, on 8/7/07, (Doc # 174) granted Capital's Request for Summary Judgment on the Foreclosure action, subject to later adjustment for application of a payment of $5,000.00 missed in the balance that had been recalculated after litigation began.

On November 3, 2008, Knight voluntarily caused the Note to be paid off in the amount calculated by Mooring and Capital dismissed its 2nd and 3rd claims on January 13, 2009 (Doc 289). Mooring refused to include the collection costs incurred at that time and demanded that Phoenix/Knight agree that such determination would be made by the Court at the conclusion of the case.

HISTORY OF ACTIVITIES GIVING RISE TO DEFENDANTS' COUNTERCLAIMS AND CLAIMS

Appendix J

From the time that Capital first acquired the Note and Mooring provided any information to Phoenix the balance demanded has been misrepresented and complaints as to its status have repeatedly and continuously been mostly ignored.[3] [3]Likewise, requests for documents and support information of the demanded balances has been continuously and repeatedly withheld or concealed even during this litigation.

Mooring had notice of Phoenix' Bankruptcy filing prior to its purchase of the loan pool, as well as the rate of interest and the current status. (See Exhibits 7. Due diligence report.) Mooring would have received Bank One's complete files shortly after or concurrent with its purchase of the pool (Jacquemin Deposition in part-Exhibit 8.) and (Nalls Deposition, in part -Exhibit 9.)

Mooring had definitely received copies of Chapter 11 documents in August, 2002, (Exhibit 10a and 10b - Attachment 5 and 6, to Moorings response dated Feb. 5, 2005, to Stan Ward, Esq.)

Therefore, Mooring knew, or should have known,

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[3] On the three occasions, between July, 2002 to January, 2006, the information that was furnished (other than listings of payments received along with letters of alleged payoff amounts) was insufficient and incomprehensible to explain, let alone justify, Moorings' position. Monthly invoices were sent only for the periods Oct, 2002, through November, 2003.

the remaining balance, terms and status of the loan as of the purchase date as represented to them by Bank One. (Exhibit 11, Letter to Vance Brown dated August 16, 2007 and attachments).

Before Mooring sent the first statement, Mooring had received $15000.00 on the Note. See Exhibit 12

Mooring knew or should have known that the information entered into the accounting system that generated the statements of amounts owed did not comport with the information furnished by Bank One and for which Mooring bargained. (See Exhibit 13 October 15,2002 billing.)

Mooring knew, or should have known, that the billed amounts had been disputed, and that action had not been taken to investigate those disputes and that no adjustment had been made to the account information. (See Exhibit 14. Activity Log.)

At a meeting of both parties' counsels in January, 2006, for the purpose of comparing schedules, Mooring presented a schedule computed at 9.75% however, a review of that schedule shows that such calculation does not agree with any amounts previously demanded. (See Exhibit 15.Schedule of Comparative Amounts)

Mooring argued that the cause of the overstatement was that those demands were based on the wrong rate of interest, that being 9.75%, and that Mooring was unaware of certain payments made to Bank One despite the fact that a calculation using those alleged assumptions would not yield the results that Mooring

maintained. (See Exhibit 16., Financial's loan schedule if computed at 9.75%).

Therefore, for the above reasons stated, Mooring had no reason to believe the truth or falsity of the statements issued nor an excuse for the arguments presented that prolonged and increased the costs of the litigation.

Capital's flurry of Motions in Limine presented in May, 2007, that included misrepresentations of facts were not ruled on by the Court until 2 weeks before the scheduled trial date, therefore most of the preparations had been completed. The Court, in its' rulings placed more reliance on Capital's statements than on Phoenix' caused more time incurred to revise those preparations. Then on the eve of the trial Capital dropped its bombshell creating the need to cancel the trial, vacate the orders with a restart of all litigation resulting in a waste of most of the resources that had been spent..

It was not until December, 2007 that Capital filed its Response to Phoenix' Motion to Reconsider, etc (Doc 189) which admitted that all the previous arguments had absolutely nothing to do with the demands made in excess of the legal balance owed.[4] In

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[4] Upon Moorings' admission on August 15,2007, as to the information furnished to them by Bank One, it became indisputable that any activity preceding the date Mooring acquired the Note was irrelevant to Moorings' calculations and demands

March, 2008, the Court ruled on Phoenix's reconsider Motion to Reconsider and vacated all the previous decisions related to the Motion for summary judgment, except the order on the foreclosure action.

In that document Mooring also notes that the interest rate input to the accounting system was 8.25%. Since Mooring had documents, on August 16, 2002, showing the 9.75% rate and the order on the second amended plan as well as the due diligence report that showed the rate was prime + 2%, even the slightest amount of care and the most cursory examination in response to Phoenix' disputes would have disclosed a discrepancy in the rate Considering that such a review would at first glance appear to be in favor of Mooring at 9.75%, such discrepancy, in the normal course of business, would have prompted further investigation culminating in at least a communication to Knight, and at most the adjustment to the true amount. Phoenix maintains that this fact alone provides a prima facie case in support of Mooring's bad faith in the proper maintenance of the account.

Knights' petition to enter the case was approved in 2008 and the Amended petition was approved in August, 2008.

At no time since Capital purchased the Note has Mooring furnished any information or calculation that supports the amounts that it demanded prior to litigation. See Exhibit 17., Comparative schedule of various loan histories

Appendix J

Phoenix/Knight stood ready and willing to pay off the mortgage in full during 2004 and would have done so had Mooring not demanded amounts in excess of the legally collectible balance to effect the release of the mortgage.

It was entirely due to Mooring's misappropriation of payments and misconduct in the maintenance of the account that the foreclosure ultimately arose.

Mooring's latest claims for attorney fees are demonstrative of their outrageous conduct since the initial involvement with the Note and Mortgage of which this case references.

MOORINGS' CLAIM FOR LEGAL FEES

The amounts showing on the billings submitted may be broken down into categories as follows:

Legal Fees for the actual and normal costs of filing of the foreclosure action for which Mooring has a contractual and statutory right for an award within the limits of the contract provisions. A review of those bills indicates that the following charges were billed relating solely to that claim:

Legal fees incurred that were in furtherance of determining the proper amount due as opposed to the misrepresented amounts that had been claimed since Mooring's initial contact. Inasmuch as the information necessary to make an accurate calculation of the remaining balance was in the exclusive control of Mooring and such information was denied by them to Knight, the determination of the legal balance due, or as here, wrongly but apparently, the amount which

Mooring would accept as full payment was entirely within the purview of Mooring. In the normal course of business that information would have been available, without the need for legal fees, at any time requested. In fact, by Federal statute, Financial, and thus Capital, were obligated to do so. Therefore, charges incurred in that respect cannot justifiably be assessed against Knight.

Mooring has profusely contested the admission of these schedules into evidence by claiming they were for settlement purposes. Phoenix submits that this refusal to acknowledge the true purpose of that procedure is "in consciousness of guilt". To call it what it was, must be to Mooring, an admission of intentionally manufacturing the information that was input into the billing system. There was no-one available authorized to make any settlement decisions and no offers were made as a result of that exchange of information.

3. Fees charged to release the lien and dismiss the action upon payment of amounts satisfactory to Mooring. Mooring had total control over determining at what amount it was willing to release its lien on the collateral, as been so aptly demonstrated by its requirements as to the payoff effected in 2008. Assuming, arguendo, that a foreclosure action would have been necessary, even if Mooring had not committed those actions complained of, in the normal course of business, the allowable legal fees would have been determined and included in the payoff, and the case inexpensively and expeditiously dismissed in its

entirety, rather than as here, Mooring made this simple function overcomplicated by believing that some exorbitant fees could be collected at the conclusion of the cases.

4. All other charges submitted were in furtherance of defending the counterclaims and claims against Mooring for its negligent misrepresentations and omissions of material facts, improper accounting, and other oppressive actions. These fees would have been significantly less but for Moorings' continuing concealment of factual information and submissions of misrepresented statements purporting to be facts, and arguments and contentions that had no basis either in law or in fact from which a reasonable man might infer were put forth in an attempt to hide or deflect attention from its deceitful activities and /or in furtherance of delaying the resolution of the litigation, and increasing the cost to a point that defendants could no longer sustain this process

A. Mooring claims it is entitled to recover fees as the prevailing party

The judgment Mooring refers to was not a final judgment as there remained an issue as to $5000 left out of the newly computed balance, Therefore, Mooring cannot technically be a prevailing party since final judgment as to the exact amount had not been determined on order by the Court. Since there are cases that support arguments either way on that issue, it is not pursued herein as being of little value in the final analysis.

However, Moorings' claims were not entirely successful, even if the judgment was considered final, as the lawful payoff amount on the default date was substantially less than the amount claimed on both Mooring's original petition and amended petition.

> See Consolidated Cut Stone Co. v Seidenbach, 181 Okla 578, 75 P.2d 442, 444. "We cannot make clearer the language used in the second paragraph of the syllabus in Detroit Graphite CO. V Carney: "The successful party to the controversy, whether the lien claimant, owner or contractor, should, if entirely successful, be allowed a reasonable attorney's fee." We hold, therefore, that the plaintiffs in error, not having recovered against the defendant in error J L Seidenbach judgments on their claims in the respective amounts for which such claims were filed, they are not entitled to judgments on the posted bonds or against said defendant in error for attorneys' fees, court costs and interest"

On the other hand, Phoenix'/Knight's goals of obtaining a release of the property for only an amount that was, at least reasonably, the true balance was eventually accomplished.

As the Court stated in Reazin v Blue Cross and Blue Shield of Kansas, Inc. 1990 10CIR 115 899 F.2d 951:

> "All of Wesley's claims arose out of a common core off acts. The relief sought by Wesley was to have Blue Cross' anticompetitive actions stopped and to recover damages suffered because of such actions. On that it succeeded"

While Moorings' Motion asks that fees be assessed only against Knight, individually, asserting that Knight's breach of contract claim, and accompanying

covenant of good faith claim were decided against her while being found in favor of Phoenix we believe those judgments, if intended, are inconsistent with one another and cannot be sustained. The contract cannot be breached as for one party and not the other when all facts of the breach are identical. Further, Capital did not file foreclosure against Knight, Knight's claims were not allowed until 2008, and any fees expense incurred by Mooring which would be allowable under the "American Rule" on which Phoenix clearly prevailed was not increased by Knight having identical claims and Mooring has failed to make a claim for a fees award against Phoenix on any claims.

B.I. Mooring claims it is contractually entitled to recover fees under the amended note.

It is well settled that reasonable attorney fees may be awarded if they are provided for in the contract between the parties.

The judgment order issued on August 7,2007, (Doc 120), was directed against Phoenix, not against Knight and the foreclosure suit was not filed against Knight.

The Note Stated "All parties agree to pay reasonable costs of collection, including an attorney's fee of 15% of all sums due upon default.

The Mortgage states "the holder agrees that if the mortgage is referred to an attorney for foreclosure, ... Second party (mortgagee) agrees to pay reasonable attorney fees not to exceed 15% of the unpaid balance after default, " [Emphasis added]

This language is clear, unambiguous and unequivocal that the fee is for the foreclosure action and that the holder will not incur costs in excess of 15% of the balance to enforce that action.

These statements are not ambiguous nor open to various interpretations, are contained within the four comers of the contract and therefore are the specific contractual authority which explicitly determined the character of the fees required to be agreed to in the contract negotiations. That characterization would, in the normal course of business, be collection costs, which would include the costs of seizing and selling the collateral if necessary.

Mooring's amended petition claimed that $275,615.35, was in default and owing on 4/8/05. The balance (as recalculated by Mooring for the November 2008 payoff) as of 4/8/05 should have been $212,906.60 ($212,130.21 plus accrued interest of $776.39 at $45.67perday)Exhibit 18..This then would yield a maximum fee of $31,936, an amount which is far in excess of the actual charges that would have been incurred in the ordinary course of business. Assuming costs of $1200, that amount represents an expenditure of 154 hours even at a billing rate of$ 200.00. Stated otherwise, an overqualified attorney working 40 hours a week for nearly a month.

.Our application of 12 O.S. Supp. 2002 § 936 to affirm the Trial Court's judgment makes it unnecessary to consider whether 42 O.S.2001 § 176 would also support this award because mortgage documents like the one at issue here contain, as a matter of law, a provision awarding attorney fees to the prevailing party, O S.2001 § 5, even though the

contractual provision in this agreement only provided for attorney fees to the Bank if it successfully pursued collection of the note.

5 Title 12 O S § 835 provides: "In any civil action to recover on a note ... the prevailing party shall be allowed a reasonable attorney fee to be set by the court." In this case, the Bank initiated the action by suing the Statons to recover what it claimed was due on the notes. The Statons asserted claims that the Bank breached the terms of the notes by wrongfully claiming that the Statons were in default on the notes. 42 O.S. § 176 provides: "In an action brought to enforce any lien, the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action " Again, the Bank initiated this action to foreclose on mortgages given by the Statons. The Statons prevailed on their claim that the bank wrongfully declared them in default and wrongfully sought to foreclose their mortgages. Both statutes provide authority for the recovery of attorney fees by the Statons. Staton v. Guarantee State Bank Of Mangum 2008 OK CIY APP 18 178 P 3d.

Under the general rule or so-called "American rule" governing the award of attorney fees to a prevailing party, attorney fees are not ordinarily recoverable in the absence of a statute or specific contractual authority. Peabody Galion Corp v Kropp, Okl., 658 P 2d 1155 (1983), Oklahoma Publishing Co. Miskovsky, 654 P.2d 596 (Okl. 1982)

Regardless of the contract notation of "legal fees not to exceed 15% of the balance due", the fees must still be reasonable. Legal fees incurred in Bank One's prior foreclosure action on the same note amounted to $

5,000 plus $347 filing fees and $ 700 abstracting costs when the judgment was entered on a balance due of approximately $370,000. Those fees also included amounts incurred for scheduling sale of the property and negotiations to delay the action not undertaken in the instant case.

In any event, fees awarded pursuant to this request must be limited to usual and customary fees charged for an unopposed foreclosure action in this area

B.2. Mooring claims it has a contractual right to recover reasonable attorney fees incurred in its defense of Knight's claims arising from the Amended Note.

Claims against Mooring were not related to resisting the foreclosure action and the only contractual right Mooring had was to collect the legal balance due in the case of default pursuant to judgment rendered.

None of the claims asserted by Phoenix or Knight arose from Mooring's attempts to foreclose on the Note. Phoenix and Knight's claims and counterclaims clearly express that the actions and omissions causing the damages asserted, while continuing after the foreclosure action, arose in 2004, in advance of, or concurrent with, the time periods when the such action was still a glint in Moorings' eye[5].

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[5] Unless such foreclosure action was always Mooring's ultimate objection

Appendix J

The court has held that where a contract is the mere inducement creating the state of things that furnishes the occasion for a tort, the tort, not the contract, is the basis of the action. Finnell v Seismic, 67 P.3d 339,344 (Okla.2003)

Oklahoma law has long recognized that an action for breach of contract and an action in tort may arise from the same set of facts. Leak-Gilbert v. Fahle, 2002 OK 66, ,-r20, 55 P.3d 1054, 1059; Great Plains Federal Savings & Loan Association v. Dabney, 1993 OK 4, ,-r7, 846 P.2d 1088, 1092; Flint Ridge Dev. v Benham-Blair & Affiliates, 1989 OK 48, ,-r7, 775 P.2d 797, 799

This is so because there is inherent in every contract a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness Panama Processes, S.A v Cities Service Co., 1990 OK 66, ,-r34, n. 58, 796 P.2d 276,290, n. 58; Lewis v. Farmers Ins. Co., Inc., 1983 OK 100, ,-r5, 681 P 2d 67,69; Keel v. Titan Constr Corp., 1981 OK 148, ,-r14, 639 P.2d 1228, 1232.

The court has held that where a contract is the mere inducement creating the state of things that furnishes the occasion for a tort, the tort, not the contract, is the basis of the action. Morriss v. Barton, 1947 OK 260, ,-r41, 190 P.2d 451,457; Independent Torpedo Co. v. Carder, 1933 OK 477,25 P.2d 62,64; Jackson v. Central Torpedo Co , 1926 OK 434, ~8, 246 P 426,428 ("If the transaction complained of had its origin in a contract which placed the parties in such a relation that, in attempting to perform the promised service, the tort was committed, then the breach of the contract is not the gravamen of the suit The contract in such case is mere inducement, creating the state of

things which furnishes the occasion of the tort, and in all such cases the remedy is an action on the case."). Finnell v Seismic, 67 P.3d 339, 344 (Okla.2003)

The Jury and the Court has determined that Mooring, in fact, tortiously breached their duty of good faith and fair dealing to Phoenix, therefore it is inconsistent to say that such is not true as it relates to Knight's identical claims.

Neither Phoenix nor Knight's claims arose from the prosecution of the defaulted Note, but rather arose from Mooring's negligence and fraudulent action in its' attempted extortion of amounts not legally owed, for the conversion of payments to its own interests, for usury, and for unjust enrichment of holding the property hostage to its demands to the detriment of Phoenix and Knight. Those reprehensible and repeated actions began before Mooring's foreclosure action, in addition to their continuance far into the litigation.

None of the time spent in defending itself from Phoenix' counterclaims (or claims of Knight)were related or relevant to the mechanics of the collection and foreclosure on the mortgage. Any time spent by Moorings' counsels in determining the balance legally due on the Note was time that should have been spent by Mooring itself prior to litigation, which if done would have negated the need for that action, and is related to the basis for Phoenix' counterclaims.

Subsequent remedial measures are not a substitute for honest performance nor does it excuse prior bad acts and omissions.

Appendix J

Neither Knight nor Phoenix have entered into any contract with the predecessor bank nor during the Chapter 11 Plan which obligates them to forego any rights or action against the holder of the Note due to that holder's negligence, fraud, or other unlawful or actionable misdeeds, therefore there cannot exist any contractual obligation on Defendants' part to pay any fees incurred by Mooring in the defense of such bad acts.

Mack Energy has used the common factor of the oil and gas liens to justify lumping together all of the time spent on defense of Pursley's breach of duty claim and in prosecution of its contract and lien foreclosure counterclaim. Examination of the trial court record and the monthly time statements submitted as an exhibit at the attorney fee hearing reveals that a substantial amount of the time spent by Mack Energy's attorneys was spent on matters not directly related to the liens The time records do little to inform us in this regard; fewer than ten hours are expressly attributed to work on the lien issues or Mack Energy's counterclaim

With narrow exceptions not relevant here, attorney fees are not recoverable in the absence of a statute or an enforceable contract expressly authorizing a fee award. Wieland v Danner Auto Supply, Inc., 695 P 2d 1332, 1333 (Okla. 1984). Pursley v. Mack Energy Co. 1995 OK CIY APP 129908 P.2d

In Reazin v. Blue Cross and Blue Shield of Kansas, Inc 1990 10CIR 115 899 F.2d 951 the Court said "Certain of Blue Cross' arguments are easily dismissed Plaintiffs' Memorandum in Support of Plaintiffs' Application for Attorneys' Fees and Bill Costs, and supporting affidavits,

specifically state that hours attributed to defense of the counterclaim were excluded" [Emphasis added]

Where multiple claims are involved, the court can distinguish between fees for which there is a statutory basis and for those for which this is not. Combs v Shelter Mutual Ins co, 2007 wi 1106122 /\3 *B.D.* Okla 4/10/07

Attorney fees are not ordinarily recoverable by one party against another in the absence of a statute or an enforceable contract. City National Bank and Trust Co v Owens, 565 P 2d 4 (Old 1977), Matter of Estate of Katschor, 637 P.2d 855 (Okl. 1981), Oklahoma Publishing Co.v. Miskovsky, 654 P.2d 596 (Okl. 1982). However, exceptions do exist to the general principle that each party should bear the expenses of his own legal representation. For example, in Owens, supra, we found that the court had inherent equitable power to award attorney fees when an opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Id 565 P.2d at 8.

As stated above, one of the exceptions to the general rule recognized at common law and in modem practice, is the court's inherent equitable power to award attorney fees regardless of the fact that an award is not authorized by statute or contract, whenever overriding considerations, such as oppressive behavior on the part of a party, indicate the need for such a recovery.

Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons ' 6 J. Moore, Federal Practice § 54.77[2], p. 1709 (2d ed. 1972); see, e.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n. 4, 88 S.Ct. 964,966, 19 L.Ed.2d 1263 (1968); Vaughan v Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L Ed 2d 88 (1962), Bell v. School Bd. Of Powhatan County, 321 F.2d 494 *(C.AA* 1963); Rolax v.

Appendix J

Atlantic Coast Line R. Co., 186 F.2d 473 *(C.AA 1951)* "
[Footnotes omitted].
All of Wesley's claims arose out of a common core of facts. The relief sought by Wesley was to have Blue Cross' anticompetitive actions stopped and to recover damages suffered because of such actions. On that it succeeded Reazin v. Blue Cross and Blue Shield of Kansas, Inc. 1990 10CIR 115899 F.2d 951

These cases support Phoenix' and Knight's claim for attorney fees, not Moorings', inasmuch as Mooring is the party who submitted implausible, unsupported arguments that it knew or should have known were false. The failure of Mooring to admit the knowledge as to the proper beginning balance owed per the Bank One records until the eve of the trial further wasted the resources of the Court and all parties since all preparations necessary to proceed had been accomplished then revised due to misrepresentations that influenced harsh rulings and lastly the admission of a material factor that caused a re-do of those activities.

Incredibly, Mooring has reasserted that argument even after admitting the non-application to the issues!

In addition to the withholding of that information so crucial to a fair determination of the issues, Mooring made more than several misrepresentations of statements made by Phoenix, its witnesses and by the Court. Without directly quoting, they further denied the possession of documents provided by Phoenix on the one hand and on the other claimed they don't understand the ones presented,. that

Appendix J

Phoenix' accounting records weren't prepared contemporaneously, their only proof of that "fact" being the records were entered on Excel workbooks, and in the same meeting complained about damage summary sheets submitted on different dates being different because thy included up to date information[6]. They either misunderstood or intentionally misrepresented the concept and character of damage claims which have been presented in the same format at least 4 different times during the course of this case in chief. Mooring also has wrongly stated that they have received NO documents in support of the damages and/or that they weren't identified as to whose claims they represented, although, according to their count, they received more than 3000 such documents in addition to having on CD more than 100 megabytes of data that comprised the complete accounting records of all financial activities of Knight and her companies as well as 8 years comparative financial statement summaries. This in addition to the detailed information provided in depositions. (Exhibits 18 -21 for examples of such documents)

It is clear that the misinformation unduly prejudiced the case and the Court developed an

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[6] Mooring was aware that the type of damages incurred were going to continue until the release of the mortgage could be accomplished and new financing obtained to eliminate and/or reduce those ongoing costs At least 4 such updated schedules along with summaries had been provided since the initial list of damages. See Exhibit

incorrect view of the nature of the claims

Mooring's false assertions, vexatious arguments, including misrepresentations of Knights testimony, and overblown and baseless attacks on Knight's credibility arguably has been a devious strategy designed to deflect attention from its reprehensible misdeeds that dwarfed any of those alleged by Mooring. It can be inferred that this deception is in furtherance of hiding their own bad acts, in delaying and frustrating the progress and outcome of the case, and targeted merely to run up the cost of the fees.

Mooring' makes another bald unsupported statement that ...."Moorings' entitled to a "fee award for prevailing on Knights claims to recover on the Amended Note because the contract merely provides an alternative basis for the fee award".

Shocking what Mooring can conjure up. This hardly bears comment, it is so off base.

A construction which would lead to an absurd result will be avoided provided it does not violate evident legislative intent. Oklahoma Water Resources Bd. v. Franco-American Charolaise, Ltd., +-646 P.2d 620 (Okl.App. 1982).

If the terms of a contract are unambiguous, clear and consistent, they are accepted in their plain and ordinary sense and the contract will be enforced to carry out the intention of the parties as it existed at the time it was negotiated. The interpretation of a contract, and whether it is ambiguous is a matter of law for the Court to

resolve. Contractual intent is determined from the entire agreement. If a contract is complete in itself and viewed in its entirety is unambiguous, its language is the only legitimate evidence of what the parties intended. The Court will not create an ambiguity by using a forced or strained construction, by taking a provision out of context, or by narrowly focusing on the provision.

.Osprey L.L.C. v. Kelly-Moore Paint Co., Inc.,1999 OK 50, -13, 984 P.2d 194. See, 15 O.S.2001 §154 provides: The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Title 15 O.S.2001 §152 provides: A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful. Southern Corrections Systems, Inc., v. Union Public Schools, K & K Food Services, Inc. v. S & H Inc. see note 31, supra; Osprey L.L.C. v. Kelly-Moore Paint Co.,. Southern Corrections Systems, Inc., v. Union Public Schools, Buck's Sporting Goods, Inc. of Tulsa v. First National Bank & Trust Co. of Tulsa, 1994 OK 14, -,r12, 868 P.2d 693.

Title 15 O.S.2001 §157 The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others. Southern Corrections Systems, Inc., v. Union Public

Appendix J

Schools;Founders Bank & Trust Co. v. Upsher, 1992 OK 35, -,rll, 830 P.2d 1355;

Title 15 O.S.2001 §155 provides: When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article. Osprey L.L.C. v. Kelly Moore Paint Co., see note 31; Wynn v. Avemco Ins. Co., 1998 OK 75, -,r17, 963 P.2d 572; Pierce, Couch, Hendrickson, Baysinger & Green v. Freede, 1997 OK 33, -,r21, 936 P.2d 906. 36. Title 12 O.S. 2001 §936, see note 4, supra. 37. Head v. McCracken, see note 26, supra; Fulsom v. Fulsom, see note 26, supra; State ex reI. Tal v. City of Oklahoma City, see note 26, supra

Reasonable attorney fees are determined under the guidelines set out in State, ex reI., Burk v. City of Oklahoma City, Okl., 598 P.2d 659 (1979); :

Neither are any fees incurred for counsel to review, analyze, hypothesize, recompute, and conjure up various scenarios, as stated in their testimony, under which to calculate and/or support a balance that Mooring wished to or had put forth properly chargeable to Phoenix or Knight Those charges when incurred, were, at a minimum, to correct the illegally demanded balance to the true amount and at most, to confound and confuse the issues presented to the Court. Somewhere in between those alternatives, those calculations were in an attempt to justify the previously demanded balances. Such justification was obviously not found since it has never been presented.

Since Mooring came to this court with unclean hands it is not entitled to any relief.

C. Mooring claims attorneys fees sought are reasonable.

Mooring attempts to project its image as magnanimous in not claiming enhancement of the fees claimed and by reducing the exhorbitant amounts claimed by various percentages to offset "potential" disagreement by Knight as to both the reasonableness of the fees and the apportionment of time spent on discrete tasks

> *In Combs v. Shelter Mutual Insurance, 2007 U.S. Dist. LEXIS 26953 (Apr. lO)The Eastern District of Oklahoma awarded attorney's fees to plaintiff pursuant to Oklahoma law. But the court awarded only the lodestar, rejecting plaintiff's request for a 33% enhancement based on "complexity of issues, and success achieved." The court noted that upward adjustments to the lodestar are "rare and exceptional" and that the factors cited by plaintiff-complexity and success - are reflected in the lodestar*

While the reality is, aside from the fact that its' own misdeeds created the enormity of the fees charged to both parties, Mooring cannot recover on the basis it claims it is entitled to.

The criteria according to Burk to be considered in determining [the amount of] any fee award are as follows including Defendants comments:

Appendix J

1. Time and labor required. 2. The novelty and difficulty of the questions. 3. The skill requisite to perform the legal service properly. 4. The preclusion of other employment by the attorney due to acceptance of the case. ,

For Moorings fees, there is no novelty or difficulty in foreclosing on a mortgage that is in default and therefore no substantial amount of time should be required.

The complexity of filing and recovering on a foreclosure could have been handled easily by a first year attorney with a billing rate of no more than $150.00 per hour.

PML *North America v. ACG Enterprises, 2007 U.S. Dist. LEXIS 22394 (Mar. 28) While approving most of plaintiffs requested attorney's fees for defendant's misconduct, the Eastern District of Michigan disallowed plaintiffs claims for fees for local counsel to serve a subpoena. The court noted that attorney's fees are inappropriate for time spent by lawyers on tasks easily delegable to nonprofessional assistants.*

5. The customary fee. 6. Whether the fee is fixed or contingent. 7. Time limitations imposed by the client or the circumstances. Time limitations apparently were not critical for Mooring as is demonstrated by Moorings' designation that no action (i.e. scheduling conference) be undertaken until six months after the parties' counsel met for the first time. The Court even had to order that something be done. (Doc 10)

Appendix J

In fact Mooring benefited by delays as interest continued to accrue on the obligation whereas if an earlier payoff was achieved by Knight, Mooring would not receive that profit[7]. Despite Mooring's actual knowledge that Phoenix' damages would be ongoing until the payoff of the mortgage for the true balance could be achieved, time did not seem to be an important consideration to them.

8 The amount involved and the results obtained.

The corrected amount of the Mortgage as recalculated by Mooring as of the date the default was declared (4/8/05) was $212,130.21 on 3/22/05 plus $ 776.39 accrued interest (45.67 per diem x 17 days) (See Exhibit 19.) as opposed to the amount claimed in Mooring petition of $363,592,28. The results obtained were that Mooring was compelled to adjust its previously demanded balance to an amount reasonably representative of the legal balance due. Upon that occurrence, Knight was able to voluntarily payoff the Mortgage, an action that would have been taken without litigation but for Moorings' failure to honestly and accurately present the payoff balance. Therefore, the litigation achieved Phoenix' and Knight's objective of obtaining a reasonably correct amount so it could refinance the Note rather than Moorings' obvious intent to collect in excess of $400,000 had the case gone forward unchallenged.

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[7] Mooring received over $89,000 more than it would have if it had not prevented the refinancing desired in June 2004.

9. The experience, reputation and ability of the attorneys.

10. The 'undesirability' of the case. This is defined to mean the case is desirable if it is capable of bringing celebrity to the attorney and increasing his client base by that reputation or the probability of additional business from the present client and their referrals.

11. The nature and length of the professional relationship with the client.

A foreclosure of a mortgage is not of such character to warrant celebrity in its successful conclusion, and the fact that Mooring is an out of state client, is within the legal community, described as a one shot client, therefore the only expectation of fees generation would be limited to what could be obtained in the one shot case warranting a downward adjustment, if any.

Moorings' counsel on page 8 footnote 3 of their Motion the reduction is actually greater than 30%, it is not. The total alleged billing of$438,063.34 x .70= $306,644.34, the amount Mooring is claiming. Perhaps this demonstrates their total misinterpretation and failure to comprehend the accounting records and damages schedules presented to them.

The likelihood of success to achieve collection of the legal balance was reasonably certain, not at all speculative, given that Phoenix had previously stood willing to pay it off, and even, if circumstances had changed so much that Phoenix was unable to do so at the then present time, there was more than adequate collateral to return the entire balance in the event of a

sheriffs sale.

Moorings claims are ludicrous and comparable in ridiculousness to Moorings' argument during the trial that it was the refinancing lender's job to determine what the payoff balance to Mooring should have been.

CONCLUSION

Inasmuch as Mooring has asked for an award of attorney fees from Knight, individually, either Mooring has no contractual or statutory claims for which recovery is allowable, for the reasons stated above, in which case, we ask that their motion be ordered denied in its entirety or alternatively, the inconsistent ruling must be reversed and Capital's fees claim is limited as detailed herein.

In either event, the ultimate conclusion is that not only would no foreclosure action have arisen had Mooring merely performed its simple administrative tasks with the least amount of care prior to 2005, the litigation could have been resolved in a short amount of time but for Moorings' frivolous arguments which deluded this Court

To award fees to Mooring would be to reward them for their acts and omissions that were at least negligent, if not fraudulent, unlawful, and wantonly reckless in addition to the post-litigation tactics of vexatiously increasing the time and costs involved in this case wasting the resources of the parties and the Court.

Appendix J

Due to the nature of the transaction involved, the fact that Mooring is an unregulated business, and the effects of its activities on its debtors, it must not be encouraged to pursue conduct such as has caused the case at bar.

Additionally, to penalize Phoenix for asserting just rights would create a chilling effect on rightful litigation by the general public who lays victim to lenders who practice activities such as lies at the core of this case, encourage the likelihood-of-recurrence of those repugnant activities and, in general, would be a travesty of justice.

This pro se litigant further asks the Court for leave to correct, supplement or more articulately plead in the event that the petition fails to comply with the clarity, format or the procedures preferred by the Court

Additionally, Knight preserves the right to recover the fees for the preparation of this response that is required by Moorings' claims of excessive fees to which it has no entitlement.

[Knight] also requests that if the Court awards any fees, that such award be granted as an offset to attorney fees awarded to Phoenix.

Respectfully submitted,

/S/Judy Knight, Pro Se

Dated: April 13th, 2009

Appendix K

APPENDIX K –PETITIONER'S SECOND AMENDED COMPLAINT

Case 5:06-cv-00006-HE Document 228 Filed 07/10/2008 Page 1 of 17

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOORING CAPITAL FUND, LLC,))

Plaintiff,))

v.) Civil Action No.: CIV-06-0006-HE

PHOENIX CENTRAL, INC., et al.,))

Defendants,)

SECOND AMENDED COMPLAINT

COMES NOW the Plaintiff, Judy Knight ("Knight"), by and through her attorney,Rodney D. Watson, and for her Second Amended Complaint against the Defendants Mooring Capital Fund, LLC ("Mooring") and Mooring Financial Corporation, ("Mooring Financial"), alleges and states as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. That Knight is and has been a resident of Cleveland County, Oklahoma, is domiciled in Oklahoma, and admits jurisdiction.

2. That Mooring is a Limited Liability Company organized under the laws of Delaware and with its principal place of business in Virginia. Mooring is not a registered foreign entity in Oklahoma.

3. That Mooring Financial is a corporation incorporated under the laws of Delaware and with its principal place of business in Virginia. Mooring Financial is the servicing agent for Mooring and its affiliates secure tax liens on property throughout the United States. Mooring Financial is not a registered foreign corporation in Oklahoma.

4. That the amount in controversy exceeds, exclusive of interest and costs, the jurisdictional sum of $75,000.00.

5. That this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

6. That this Second Amended Complaint is filed under Order of this Court entered July 2, 2008.

7. That on July 14, 1992, Knight personally executed a note and mortgage for $400,000.00 with Central Bank of Oklahoma City "Central Bank").Knight's corporation, Phoenix Central, Inc. ("Phoenix"), was also a party to the note and mortgage, and supplied collateral for the same in the form of a strip shopping center located in Norman, Cleveland County, Oklahoma.

8. That the July 14, 1992, note was extended to a maturity date of July 15, 1998, creating an amended note ("Amended Note"), with both Knight, personally, and Phoenix as makers. The strip shopping center

remained as collateral on the Amended Note. A copy of the Amended Note is attached hereto, marked "Exhibit A," and incorporated herein as if set forth throughout.

9. That, sometime between July 14, 1992, and July 15, 1998, Bank One, Oklahoma, N.A. ("Bank One"), Mooring's predecessor-in-interest,purchased Central Bank and became holder of, among other debts, the Amended Note.

10. That on January 26, 1998, and after Knight's and Phoenix's default on the Amended Note, Bank One and Central Bank initiated suit in the Cleveland County District Court, *Bank One, et al. v. Knight, et al.*, Case No. CJ-1998- 197, requesting foreclosure and a sheriff's sale of the collateral property under the Amended Note. Bank One and Central Bank subsequently received an entry of summary judgment on August 25, 1998, against Knight and Phoenix to foreclose and sell the strip shopping center.

11. That, in response to Bank One's foreclosure, on March 9, 1999, Phoenix filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code; and, on February 28, 2001, the United States Bankruptcy Court for the Western District of Oklahoma entered an Order Confirming Phoenix's Fourth [sic] Amended Plan of Reorganization ("Confirmed Plan").

12. That the Confirmed Plan set out the payment plan on the remainder of the Amended Note as payments of $5,000.00 per month, each due on the 28th day of each

month, with interest at a rate of prime plus two-percent (2%), with the maturity date set ten (10) years later.

13. That, sometime between May and July, 2002, Mooring scrutinized and purchased a loan pool from Bank One, including the Amended Note governed by the Confirmed Plan.

14. That on July 24, 2002, Mooring sent Knight a letter advising her that future payments on the Amended Note and mortgage were to be sent to Mooring Financial, Mooring's servicing agent for the purchased Amended Note. This letter provided an account number, but no financial information.

15. That Mooring knew the balance remaining on the Amended Note and the Confirmed Plan when it purchased the Amended Note from Bank One in that Bank One furnished Mooring with the following information regarding the Amended Note. principal balance of $288,433.80, accrued and unpaid interest of $27,606.32 (creating a total of $316,040.12), interest rate of prime plus two-percent (2%), collateral being the strip shopping center, and the then-current status, which was that all payments were up to date, with a previous Chapter 11 Bankruptcy filed.

16. That Mooring knew or should have known the full balance remaining on the Amended Note because it would have been the amount bargained for and exchanged as a part of its purchase from Bank One.

17. That the first monthly statement sent to Knight from Mooring Financial regarding the Amended Note

showed a balance due of $391,421.28, due on October 15, 2002, even though Mooring had received at least $15,000.00 in payments since its purchase of the Amended Note.

18. That for all times preceding this complaint's filing, Mooring and Mooring Financial have communicated invalid and inflated payoff amounts due and owing to Knight on the Amended Note. Mooring and Mooring Financial have failed to provide any reasonable or consistent balance. Further, they have not been able to adequately explain the severe fluctuations in the Amended Note's balance. A summary of the Amended Note's balance fluctuations, their dates, and their sources has been attached hereto, marked "Exhibit B," and incorporated herein as if set forth throughout.

19. That prior to suit being filed by Knight, Knight, both individually and through counsel, has made multiple demands upon Mooring and Mooring Financial to provide documents supporting their calculations as to the alleged amounts owed. With three (3) exceptions, Mooring and Mooring Financial have consistently failed to respond to these communications.

20. That as of February 2005, Knight had made total payments to Mooring and Mooring Financial in the amount of approximately $150,000.00, none of which had been applied to reduce the Amended Note's principal balance

21. That the application of payments in the aforementioned manner generated additional

improper interest charges.

22. That Mooring and Mooring Financial have fraudulently concealed the evidence illustrating their gross negligence and breach of contract by failing to provide these documents and answers. It was not until on or about August 15, 2007, that they provided the documents that revealed the true extent of their harmful acts and the full damages sustained by Knight

23. That Mooring and Mooring Financial have engaged in a continuous course of injurious conduct. As such, each misrepresentation and omission lies in the sequence of one continuous act.

24. That the strip shopping center held as collateral on the Amended Note has an appraised value in excess of $1,000,000.00, and third party lenders have informed Knight that this is the only property they would accept as collateral. Accordingly, any funding Knight could receive to continue her ongoing projects and to pay Mooring's debt could only be received by pledging the strip shopping center as collateral.

25. That Mooring is the only party that retains the power to release its lien on the strip shopping center, and in failing to provide accurate payoff information to Knight and third parties, it has virtually locked Knight into a position that has caused her to default on the Amended Note, and to delay

development on her profit-generating projects.

26. That Knight attempted to obtain financing from third party lenders to pay the remainder of the Amended Note and to fund other business ventures,

but Mooring's and Mooring Financial's misrepresentations and accounting failures have prevented such financing.

27. That as a result of Mooring's improper accounting of amounts due and owing under the Amended Note, and because of Mooring's failure to communicate a proper accounting of the amounts due to Knight and third parties, Knight has not obtained financing which would have provided for new and ongoing projects, in addition to refinancing on the Amended Note. Accordingly, Knight has been damaged in the form of lost business reputation and delayed business ventures, including the development of a forty (40) acre tract of land into individual residential lots.

28. That Knight has sustained damages in the form of the continued cost of ownership for such delayed business ventures, including, but not limited to, payment of real estate taxes on two (2) houses and the forty (40) acre tract of land, which would have been sold had refinancing occurred.

29. That Knight has sustained damages in the form of lost investment earnings (e.g., interest) which would have accrued on the capital gained from the sale of the above-referenced properties.

FIRST CAUSE OFACTION NEGLIGENCE

30. That Paragraphs 1-29 are incorporated herein as though set forth throughout.

31. That the creditors on the Amended Note, Mooring and Mooring Financial, owe Knight a duty to

accurately account for all payments made and to charge only those sums due under the Amended Note, as governed by the Confirmed Plan.

32. That the creditors on the Amended Note, Mooring and Mooring Financial, owe Knight a duty to timely and accurately communicate loan and payoff information to her and all necessary third parties when requested to do so.

33. That Mooring and Mooring Financial failed to use due care in their calculation of amounts they claim are owed by Knight.

34. That Mooring and Mooring Financial failed to use due care and acted in reckless disregard of the truth and falsity of its statements when it communicated overstated, incorrect and improper amounts due to Knight and third party lenders.

35. That Mooring and Mooring Financial's continuing failure to investigate and respond to Knight's requests for a proper accounting of the Amended Note and their inability to communicate accurate payoff information to third parties when it knew or should have known that such would lead to a full payoff of the Amended Note illustrates either their malicious and wanton intent or total recklessness amounting to gross negligence.

36. That Mooring's and Mooring Financial's negligence in communicating amounts owed by Knight resulted in Knight losing at least two (2) separate refinance loans, injuring Knight in the form of delayed development and real property projects, the

continuing costs of ownership for such delayed projects, lost business reputation, and lost investment earnings.

37. That such refinances would have allowed payment in full of the true amounts owed to Mooring and would have provided for other expenses required to further and improve the profit objectives of Knight.

38. That it was foreseeable that Knight may want to refinance the Amended Note at any time, at the very least to receive a lower interest rate and/or a longer maturity, to lower periodic payments, to obtain additional funding for personal and business expenses based on the rising equity in the property, to divide or sell the property, or for any other reason. It was equally foreseeable that injury would be likely, if not definite, to occur if Mooring and Mooring Financial were to deny or delay Knight's right to pay the outstanding balance in full.

39. That as a result of Mooring and Mooring Financial's gross and wanton negligence, Knight has been injured in the form of delays in development and sale of real property projects, the continuing costs of ownership for such delayed projects, market fluctuations affecting completion costs and values of such delayed projects, lost business profits and reputation, and lost investment earnings. Mooring and Mooring Financial's actions have also precluded Knight from obtaining funding to pay the full and true amounts owed to Mooring.

40. That Mooring and Mooring Financial's gross

negligence and wanton conduct necessitates the imposition of punitive damages to punish and discourage their damaging business practices.

41. That Knight has and will continue to accrue significant attorney's fees and costs for the prosecution of this action and for the attempted resolution attempts made by Knight and her counsel prior to litigation.

WHEREFORE, for the foregoing reasons, Knight prays for judgment against Mooring and Mooring Financial in an amount in excess of $75,000.00, in addition to punitive damages, together with interest costs and attorney fees.

SECOND CAUSE OF ACTION BREACH OF CONTRACT

42. That Paragraphs 1-41 are incorporated herein as though set forth throughout.

43. That, as successor-in-interest to Bank One and, previously, Central Bank, Mooring and Mooring Financial owe a duty to Knight, as party to the Amended Note, to deal with her in fairness and in good faith.

44. That Mooring's and Mooring Financial's demands for payment in excess of those sums legally owed acts as a breach of the Confirmed Plan.

45. That Mooring's and Mooring Financial's demands are also a breach of their duty of good faith and fair dealing.

46. That as a result of Mooring and Mooring Financial's breach of contract, Knight has been injured in the form of delays in development and sale of real property projects, the continuing costs of ownership for such delayed projects, market fluctuations affecting completion costs and values of such delayed projects, lost business profits and reputation, lost investment earnings and reduced the prospect of new business. Further, their actions have also precluded Knight from obtaining funding to pay the full and true amounts owed to Mooring.

47. That Mooring's and Mooring Financial's actions have forced Knight to expend time and resources in prosecuting this action.

48. That Mooring and Mooring Financial knew or should have known of the consequences for Knight stemming from its breach of such agreement since they knew or should have known that Knight's income stemmed from the success of her commercial transactions.

WHEREFORE, for the foregoing reasons, Knight prays for judgment against Mooring and Mooring Financial in an amount in excess of $75,000.00 for their breach of contract, together with interest costs and attorney fees.

THIRD CAUSE OF ACTION TORTIOUS BREACH OF CONTRACT

49. That Paragraphs 1-48 are incorporated herein as though set forth throughout.

50. That Mooring and Mooring Financial knew the amounts it communicated as due and owing to third parties and others was not true.

51. That Mooring and Mooring Financial had no reasonable ground for believing the various incorrect amounts it communicated as due and owing to third parties was true and correct.

52. That Mooring and Mooring Financial were bound to disclose the accurate and true amount owed to it by Knight to Knight and other parties

53. That Knight, individually and through counsel, had previously informed Mooring and Mooring Financial of the incorrect balances and had attempted to obtain a corrected balance on numerous occasions.

54. That Mooring and Mooring Financial's false representations to third parties and to Knight of the amount owed created an untrue or misleading impression of the actual amount due.

55. That Mooring and Mooring Financial intended to collect under Knight's obligation more than it was lawfully owed.

56. That Mooring and Mooring Financial's deceit directly and proximately caused Knight to suffer damages.

57. That as a result of Mooring and Mooring Financial's tortious breach of contract, Knight has been injured in the form of delays in development and sale of real property projects, the continuing costs of ownership for such delayed projects, market

fluctuations affecting completion costs and values of such delayed projects, lost business profits and reputation, lost investment earnings and have reduced the prospect of new business. Mooring and Mooring Financial's actions have also precluded Knight from obtaining funding to pay the full and true amounts owed to Mooring.

58. That Mooring's and Mooring Financial's actions have forced Knight to expend time and resources in prosecuting this action.

59. That Mooring and Mooring Financial's actions were intentional and with malice towards Knight and others; or, alternatively, Mooring and Mooring Financial's actions were grossly reckless and wantonly negligent.

60. That Mooring and Mooring Financial derived and continue to derive an increased financial benefit as a direct result of its actions causing injury to Knight as described above.

61. That Mooring and Mooring Financial have been unjustly enriched by completely and improperly converting sums paid on the Amended Note to interest as opposed to distributing them such that the principal balance would be reduced.

62. That by improperly converting Knight's payments to interest, Mooring and Mooring Financial have effectually gathered funds at an exorbitant interest rate in excess of the contract rate of interest, a violation of the usury laws of the State of Oklahoma.

WHEREFORE, for the foregoing reasons, Knight

prays for judgment against Mooring and Mooring Financial in an amount in excess of $75,000.00, together with interest thereon for their tortuous breach of contract in this case in addition to punitive damages, costs and attorney fees.

FOURTH CAUSE OF ACTION TORTIOUS INTERFERENCE WITH PRESENT AND PROSPECTIVE BUSINESS RELATIONS

63. That Paragraphs 1-62 are incorporated herein as though set forth throughout.

64. That Knight had a valid business expectancy with several lenders to fund loans that would have allowed Knight to pay off its loan to Mooring.

65. That Mooring and Mooring Financial had knowledge of Knight's business expectancy with these lenders.

66. That Mooring and Mooring Financial supplied incorrect payoff amounts to these third parties.

67. That Mooring and Mooring Financial knew, or should have known, that the amounts it supplied to these third parties were incorrect.

68. That Mooring and Mooring Financial's actions were intentional in that it either desired to interfere with Knight's loan contracts or that they were substantially certain that their actions would negatively interfere with the contracts.

69. That Mooring and Mooring Financial's intentional acts prevented Knight's prospective loans with these

lenders from closing.

70. That Mooring and Mooring Financial's intentional acts tortiously interfered with the development and progress of Knight's ongoing profit objective and real property projects, including but not limited to those done independently with Knight's corporation, Phoenix Central, Inc.

71. That Mooring's and Mooring Financial's communication of false information to third parties was improper and unfair.

72. That Knight suffered damages as a direct result of Mooring and Mooring Financial's false communications to third parties.

73. That as a result of Mooring and Mooring Financial's tortious interference with Knight's business relations, Knight has been injured in the form of delays in development and sale of real property projects, the continuing costs of ownership for such delayed projects, market fluctuations affecting completion costs and values of such delayed projects, lost business profits and reputation, lost investment earnings and reduced the prospect of new business.. Mooring and Mooring Financial's actions have also precluded Knight from obtaining funding to pay the full and true amounts owed to Mooring.

74. That Mooring's and Mooring Financial's actions have forced Knight to expend time and resources in prosecuting this action.

75. That Mooring and Mooring Financial's actions were either intentional and with malice towards

Knight and others or grossly reckless and wantonly negligent.

76. That Mooring and Mooring Financial derived and continues to derive an increased financial benefit as a direct result of its actions causing injury to Knight as described above .

prays for judgment against Mooring and Mooring Financial in an amount in excess of $75,000.00, together with interest thereon for their tortious interference with prospective business relations in this case, in addition to punitive damages, costs and attorney fees.

Respectfully submitted,

s/Rodney D. Watson

Appendix K